Supreme Court U.S.

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No. ____

IN THE

Supreme Court of the United States

IN RE: PETITION OF MCALLISTER TOWING AND TRANSPORTATION COMPANY, INC., AS OWNER OF THE TUGS IONA MCALLISTER AND JAMES MCALLISTER

McAllister Towing and Transportation Company, Inc. and Owl International, Inc. d/b/a Global Associates, Joint Petitioners

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this admiralty case, the Court of Appeals for the Third Circuit, in dismissing petitioners' third-party claims against the United States, limited this Court's ruling in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), and thereby reopened a conflict among the circuits that *Lockheed* had settled. In *Lockheed*, this Court held that the exclusivity provision of the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8116(c), which provides first-party immunity for the United States where it pays compensation to its injured employee, "does not directly bar" third-party claims. In so defining the scope of FECA's immunity and confirming that FECA did not disturb settled principles of maritime law, this Court sided with a decision of the Fourth Circuit that the Third Circuit in this case rejected as "unpersuasive" and "counter to the weight of authority." The Third Circuit followed a Fifth Circuit decision that held that although FECA does not "directly" bar third-party contribution claims, it may operate to "indirectly" bar such claims.

The question presented is:

Did the Third Circuit err in holding that FECA's grant of first-party immunity to the United States also bars an otherwise valid and conventional claim in admiralty for third-party contribution and tort indemnity against the United States?

CORPORATE DISCLOSURE STATEMENT

Neither petitioner McAllister Towing and Transportation Company, Inc. nor petitioner Owl International, Inc. d/b/a Global Associates has any parent corporations, nor are there any publicly held companies that hold 10% or more of their stock.

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In The
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IN RE: PETITION OF MCALLISTER TOWING AND TRANSPORTATION COMPANY, INC., AS OWNER OF THE TUGS IONA MCALLISTER AND JAMES MCALLISTER

McAllister Towing and Transportation Company, Inc. and Owl International, Inc. d/b/a Global Associates, Joint Petitioners

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, McAllister Towing and Transportation Company, Inc. ("McAllister") and Owl International, Inc. d/b/a Global Associates ("Global"), pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Third Circuit rendered in these proceedings on December 21, 2005.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Pennsylvania granting the United States' motion for judgment on the pleadings, dated September 9, 2004, is reported at 2004 WL 2009330 and appears at App. 24. The panel

opinion of the Court of Appeals for the Third Circuit affirming the district court, filed December 21, 2005, is reported at 432 F.3d 216, and is reprinted at App. 3.

JURISDICTION

The Court of Appeals entered judgment on December 21, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The exclusivity provision of the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8116(c), provides:

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew or a vessel.

STATEMENT OF THE CASE

1. Jurisdiction Below.

The district court had jurisdiction based on the admiralty jurisdiction of the federal courts, the Suits in Admiralty Act, 46 App. U.S.C. §741, *et seq.*, and the Public Vessels Act, 46 App. U.S.C. §781, *et seq.* After the district court entered judgment in favor of the United States, McAllister and Global timely filed appeals in the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1292(a)(3), which provides for jurisdiction over appeals from interlocutory decrees of the district courts in admiralty cases that decide the rights or liabilities of a party. *See, e.g., Petroleos Mexicanos Refinacion v. M/T KING A (Ex-TBILISI)*, 377 F.3d 329, 336-37 (3d Cir. 2004).

2. The Facts of the Case.

The facts of this case are not materially at issue, as the matter was disposed of on the government's motion for judgment on the pleadings. The case arises out of injuries suffered by Todd Bruemmer, a civilian merchant seaman in the employ of the United States of America. Mr. Bruemmer was a crew member aboard the USNS MOHAWK, a vessel owned by the government and operated in service to the United States Navy. The United States had planned to tow a retired vessel, the ex-USS GUADALCANAL, from its berth in Philadelphia to the James River in Virginia. The USNS MOHAWK was assigned to do the towing. Petitioner Global, the agent or contractor for the United States, enlisted the services of petitioner McAllister and others to assist with the towing operation. During the course of the attempted

tow, Mr. Bruemmer was struck by a broken portion of the MOHAWK's towing gear assembly and suffered severe personal injuries.

The accident quickly was determined by the Navy to be the fault of the United States. The Navy issued a report that concluded that the "accident was caused by a series of errors in judgment made by Captain Wanzor, Master, USNS MOHAWK." The Navy report did not fault any other party.

Nevertheless, Mr. Bruemmer and his wife filed an action in the Pennsylvania Court of Common Pleas, Philadelphia County, naming McAllister and certain individual vessel pilots, seeking damages for Mr. Bruemmer's injuries. The Bruemmers did not name the United States as a defendant, presumably because the United States paid compensation to Mr. Bruemmer and enjoys immunity from claims by its injured employees under the provisions of FECA. Upon initiating a Complaint for Exoneration From or Limitation of Liability in the United States District Court for the Eastern District of Pennsylvania – an action that resulted in a district court order restraining the state court suit – McAllister filed third-party claims against the United States for contribution and indemnity. Global, which had been impleaded, also asserted cross-claims against the United States.

3. The District Court Proceedings.

The United States moved the district court, pursuant to Fed.R.Civ.P. 12(c), for judgment on the pleadings. The government contended that all third-party claims against it were barred because FECA "prohibits claims for contribution and indemnity derived solely from the government's alleged status as

a joint tortfeasor." The United States argued that it "makes little sense to allow a third-party plaintiff to do indirectly what Congress has specifically prohibited the worker from doing directly."

Petitioners McAllister and Global opposed the motion, relying primarily upon this Court's decisions in *Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597 (1963), and *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), each of which held that FECA did not bar claims against the United States by third parties who were unrelated to the injured employee. This Court held that "[w]hatever Congress might have done, it did not intend FECA's exclusive liability provision to override the rights of unrelated third parties[.]" *Lockheed*, 460 U.S. at 195 n.5 (citing *Weyerhaeuser*). This Court also held that in enacting FECA, Congress did not have any purpose to "'disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases.'" *Lockheed*, 460 U.S. at 195 (quoting *Weyerhaeuser*, 372 U.S. at 601).

The district court granted the United States' motion for judgment on the pleadings. The district court reiterated the phrase in *Lockheed* that "FECA's exclusive liability provision does not *directly* bar" a third-party indemnity action against the United States." App. 34. The district court added emphasis on the term "directly" in this passage. The district court believed that the "implication of the statement is clear: while FECA's exclusive liability provision does not *directly* bar a third-party action, it may do so *indirectly*, depending on the underlying substantive law." App. 34.

The district court recognized, and the government did not contest and has never contested (either in the district court or on appeal) that the substantive maritime law "does recognize a right of contribution between joint tortfeasors." App. 35. But the district court believed that the FECA statute, which *Lockheed* said was not intended to affect the rights of unrelated third parties, nonetheless eliminates that right. The district court looked to this Court's decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), involving contribution claims under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, *et seq.* Based on *Halcyon* and its further explanation in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), and importing similar principles into this FECA case despite the scope of FECA immunity expressed in *Lockheed*, the district court determined that there is a "rule" that "there can be no third-party suit against a joint tort-feasor where the tortfeasor has statutory immunity from the first-party plaintiff." App. 36.

"In sum," the district court held, "while FECA's exclusive liability clause does not *directly* bar third-party suits against the United States, it does figure into the analysis of the underlying substantive law in such suits." App. 37-38. "[S]ince Bruemmer has no tort claim against the United States, neither do the third-party plaintiffs." App. 38.[1]

[1] The district court also dismissed McAllister's contract-based claims, the one category of claims that it believed could survive FECA, finding that they failed to state claims for relief. Those issues are not presented to this Court for review on certiorari.

4. Proceedings in the Court of Appeals.

The court of appeals affirmed the district court's dismissal of petitioners' ~~third-party~~ claims against the United States. The court of appeals immediately acknowledged this Court's twin holdings in *Lockheed* and *Weyerhaeuser* that FECA "~~does not, by~~ its terms," bar contribution, but it noted that "other principles" might bar such claims. App. 5. Those "other principles," it turns out, likewise emanate from FECA's exclusivity provision, which according to the court of appeals barred petitioners' third-party contribution claims through the indirect means of eliminating underlying substantive liability.

The court of appeals embraced its prior decision in *Travelers Ins. Co. v. United States*, 493 F.2d 881 (3d Cir. 1974). *Travelers* was decided in the wake of *Weyerhaeuser* and identified a "hopeless conflict" among the federal courts that ultimately was accepted for review by this Court in *Lockheed*. "The principal source of this conflict [was] the broad language in *Weyerhaeuser* that 'there is no evidence that Congress was concerned with the rights of unrelated third parties.'" App. ~~12.~~ (quoting *Travelers*, 493 F.2d at 885). On one side stood the Fourth Circuit's decision in *Wallenius Bremen G.m.b.H. v. United States*, 409 F.2d 994 (4th Cir. 1969), which gave full effect to the language in *Weyerhaeuser* and held a FECA-based "personal defense to suit by an injured worker to be 'irrelevant' to the question of [the government's] liability for contribution or indemnity claims." App. 12. But other courts of appeal disagreed and adopted a cramped reading of *Weyerhaeuser*. The Third Circuit in *Travelers* rejected the Fourth

Circuit's decision in *Wallenius* and sided instead with the Ninth Circuit's ruling in *United Airlines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir. 1964), that "the absence of an independent basis of liability from the government to ... the third party," which resulted from FECA, "was fatal." App. 14.

The Third Circuit in the present case was convinced that its ruling in *Travelers* was still good law. It relied on *Travelers* and the Ninth Circuit's decision in *Wiener* along with several old precedents contrary to *Wallenius* that temporarily held sway during the period between *Weyerhaeuser* and *Lockheed*. Although the Third Circuit accurately acknowledged that after these rulings the Supreme Court in *Lockheed* "essentially held that there *were* no implications" of the FECA exclusivity provision, App. 15 (emphasis original), the Third Circuit did not find that this undermined the viability of *Travelers*.

Like the district court, the Third Circuit in this case believed that its reaffirmation of *Travelers* was justified or compelled by two pre-*Lockheed* Supreme Court admiralty cases: *Halcyon* and *Cooper*. *Cooper* reasserted the maritime rule of contribution in non-collision cases but distinguished *Halcyon*, which involved a claim for third-party contribution under LHWCA. In *Halcyon*, contribution was not allowed. The Third Circuit, like the district court, believed that *Cooper* established a *general* rule that where "the party against whom contribution is sought cannot be held liable to the plaintiff, the basis for mutual responsibility, and thus for contribution, disappears." App. 18. The Third Circuit was unmoved by the fact that the government had stressed both *Halcyon* and *Cooper* in opposing certiorari in *Lockheed*, App. 95,

and that this Court in *Lockheed* rejected the government's analysis and distinguished its LHWCA ruling in *Halcyon* as "entirely irrelevant" to the FECA analysis. 460 U.S. at 197 n.8.

The Third Circuit rejected the Fourth Circuit's decision in *Wallenius*. Acknowledging that *Wallenius* (which also arose in admiralty) was directly relevant and irreconcilable because it "supports [petitioners'] view that liability for contribution claims does not turn on the indemnitor's first-party liability to the injured person," the Third Circuit discarded *Wallenius* as "unpersuasive" and "counter to the weight of authority." App. 21. While it noted that *Wallenius* created the "hopeless conflict" that it identified in *Travelers*, the Third Circuit did not appear to believe that the Supreme Court embraced *Wallenius* in its ruling in *Lockheed*.

Instead, the Third Circuit adopted as correct the Fifth Circuit's ruling in *Walls Industries, Inc. v. United States*, 958 F.2d 69 (5th Cir. 1992). That admiralty case likewise involved a private party's contribution claim arising from its liability for injuries to a federal civilian employee working on a United States vessel. The Fifth Circuit believed it had unearthed the reason this Court used the word "directly" in *Lockheed*, namely, because in cases like the present that involve contribution claims, "FECA has the effect of *indirectly* barring a third-party indemnity action[.]" 985 F.2d at 71 (emphasis supplied). To the *Walls* court, *Lockheed* presented no barrier to a finding of immunity based on FECA because "'[c]ontribution and indemnity are available only if the joint tortfeasors share a common liability to the plaintiff[.]'" App. 20 (quoting *Walls*, 958 F.2d at 71).

The Third Circuit held that mutuality of liability was required for contribution and that FECA defeated that mutuality: "We agree with the District Court that Appellants' remedies against the United States depend on the United States's liability for the underlying injury. Because FECA immunizes the United States from such liability, there can be no claim for contribution as a matter of law." App. 22-23.

The Third Circuit did not comment on the additional arguments presented by McAllister that the district court failed to recognize that the case involved third-party claims that were independently viable under *Weyerhaeuser* and *Lockheed* because McAllister sought contribution and indemnity under longstanding principles of admiralty law which, as this Court stated in *Lockheed* and *Weyerhaeuser*, Congress had no purpose in enacting FECA to disturb.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit Erred When It Resurrected the Precise Conflict Settled by This Court in *Lockheed* and Held (Consistent with the First, Fifth, D.C., and Ninth Circuits, but in Direct Conflict with the Fourth Circuit) That FECA Defeats an Otherwise Valid Contribution Claim Against the United States.

Some 45 years ago, this Court ruled in *Weyerhaeuser* that in enacting FECA Congress was not "concerned with the rights of unrelated third parties." 372 U.S. at 601. In the intervening decades, Congress has never acted to disturb this conclusion. Yet (perhaps because many other workers

compensation schemes provide broader immunity) there has been a long and tortured history of lower court resistance to this Court's discernment of a narrow scope of government immunity under FECA. In *Weyerhaeuser*'s wake, in most every circuit, the government continued to receive not only first-party immunity but also third-party FECA immunity. As the United States pointed out twenty years after *Weyerhaeuser* in its brief opposing the petition for a writ of certiorari in *Lockheed* (the government's brief, as well as Lockheed's petition, are attached in the Appendix), with the exception of the Fourth Circuit, "every circuit to address the question ha[d] held that the FECA bars third-party claims against the United States that are not based on some independent contractual duty." App. 96. The United States characterized the contrary ruling of the Fourth Circuit in *Wallenius* as a "maverick position." App. 96.

But it was impossible for the government to trivialize the Fourth Circuit's decision in *Wallenius*. Significant pressure was brought to bear on the conflict *Wallenius* created by the Commission on Revision of the Federal Court Appellate System. That commission, chaired by Senator Roman L. Hruska, was charged with studying a growing crisis in the federal appellate courts. In its 1975 "Report on Revision of the Federal Court Appellate System," reported at 67 F.R.D. 195, the Hruska Commission made the somewhat radical recommendation that Congress establish a National Court of Appeals. Deeply troubled by the fact that mounting appellate burdens had left several important conflicts among the circuits unresolved, the Hruska Commission identified as the number one conflict the "hopeless conflict" identified by the Third Circuit in *Travelers*.

67 F.R.D. at 283-84. *Travelers* and its sister rulings conflicted directly with *Wallenius* on an important issue of law: the United States' claim of third-party immunity emanating from the FECA statute. 67 F.R.D. at 300 notes 6-8.[2]

Although this Court in *Lockheed* did not recite by name every precedent that, in opposition to *Wallenius*, created the conflict it was reviewing — a fact that, incredibly, appears to have confused the Third Circuit here with respect to the continuing vitality of its decision in *Travelers* — this Court made clear that it was reviewing the lower court's decision to resolve what *Travelers* dubbed the "hopeless conflict":

> [The lower court in this case] concluded that §8116(c) barred Lockheed's third-party claim against the United States. In reaching this conclusion, the Court of Appeals relied primarily on several decisions by other courts of appeals. *See, e.g., Kudelka v. American Hoist & Derrick Co.*, 541 F.2d 651, 658-660 (CA7 1976); *Galimi v. Jetco, Inc.*, 514 F.2d 949 (CA2 1975). The court recognized, however, that its holding was contrary to that reached in *Wallenius Bremen G.m.b.H. v. United States*, 409 F.2d 994 (CA4 1969), *cert. denied*, 398 U.S. 958 (1970). We granted certiorari to resolve the conflict.. . . We now reverse.

460 U.S. at 192-193 (internal footnote omitted).

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[2] The number of United States federal and postal employees covered by FECA has since swelled to approximately 3 million.

Surely it is of no moment that this Court did not list *Travelers* by name. The lower court's ruling in *Lockheed* compiled the list more completely, stating that under the applicable "settled rule," FECA barred the contribution claim, "E.g., *Galimi*. . . *Travelers* . . *Wiener*...*Contra*, *Wallenius* . . . ." *Thomas v. Lockheed Aircraft Corp.*, 665 F.2d 1330, 1332 (D.C. Cir. 1981), *rev'd, Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983).

Galimi — which this Court cited as representative of the conflict — was little more than an adoption of the Third Circuit's approach in *Travelers*. *Galimi* specifically weighed *Travelers* and its sister rulings against *Wallenius* and this Court's ruling in *Weyerhaeuser*. Echoing the lament of the Third Circuit in *Travelers* that the conflict was "hopeless," the Second Circuit in *Galimi* despaired that these various precedents were irreconcilable and that it "emerge[d] from the thicket without any clear sense of direction." 514 F.2d at 955. To escape this "thicket," the Second Circuit in *Galimi* turned, in now-familiar fashion, to this Court's ruling in *Cooper* to carry the day. This is just what, thirty years later, the government urged and what both the district court and the court of appeals did in this case.

In *Cooper*, this Court reaffirmed the general maritime law's rule of contribution among joint tortfeasors. 417 U.S. at 111. This is the critically important rule of admiralty law that would otherwise govern here had the Third Circuit not determined that it must yield to FECA. *Cooper* did not involve a statutory overlay, and *Cooper* distinguished *Halcyon* and *Halcyon*'s progeny, *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, 406 U.S. 340 (1972) (per curium), each of which involved the LHWCA. In

Halcyon and *Erie*, the government was "entitled to the protective mantle of the Act's [LHWCA's] limitation of liability provisions." *Galimi*, 514 F.2d at 955-956 (quoting *Cooper*, 417 U.S. at 114-115). Based on this passage from *Cooper*, the Second Circuit in *Galimi* concluded that the "protective mantle" should be dispositive of the third-party contribution analysis in a FECA case as well. 514 F.2d at 956.

The Third Circuit's reasoning in this case is indistinguishable from the Second Circuit's ruling in *Galimi*, which lost before the Supreme Court. The Third Circuit in this case likewise looked to *Cooper* as dispositive. Although no party has disputed, as this Court has held, that the "right of contribution belongs to the substantive law of admiralty," *Lehigh Valley R. Co. v. Cornell Steamboat Co.*, 218 U.S. 264, 270 (1910), the Third Circuit read FECA exclusivity into that substantive law to alter it. But *Cooper* did not require substantive *liability* by both parties to the injured person as a prerequisite to contribution – liability is not the same thing as "fault," and "fault" was the limiting principle espoused by this Court in *Cooper*. 417 U.S. at 115 ("Contribution rests upon a finding of concurrent fault"). Based on *Cooper*, the Third Circuit concluded here — just as the Second Circuit concluded in *Galimi* before the Supreme Court corrected it — that "[w]here the substantive law makes the existence or non-existence of the government's liability to the first party relevant, we cannot conclude, as the Fourth Circuit Court of Appeals did in *Wallenius*, that it is 'irrelevant.'" App. 21.

This is an unusually blatant instance of a court of appeals departing from this Court's precedents. There was a circuit conflict, and it was resolved by

this Court, only to be resurrected here by the Third Circuit. *Travelers* did not survive *Lockheed*, yet the Third Circuit applied it here. *Galimi* was on the losing side in *Lockheed*, yet the Third Circuit followed its path precisely here. *Wallenius* emerged victorious in *Lockheed*, yet the Third Circuit rejected it here, now for a second time, as "unpersuasive" and "counter to the weight of authority." The lower court ruling in *Lockheed* (665 F.2d at 1332) — that contribution requires a "joint liability of both parties to the injured person," a joint liability it ruled was lost in light of FECA — was reversed by this Court, but the Third Circuit made the same ruling in this case. Most importantly, if the Third Circuit were correct, it is difficult to see any impact that *Lockheed* would have on the law: If FECA provides the means for "indirectly" destroying a third-party contribution claim that applicable substantive law otherwise recognizes, what difference does it make that FECA does not "directly" bar the claim?[3] This Court ruled in *Lockheed* and *Weyerhaeuser* that in passing FECA, Congress had no concern whatever to affect the rights of unrelated third parties, yet the Third Circuit in this case held FECA had a dispositive effect on the otherwise valid maritime contribution rights of third parties.

[3] *Lockheed* itself involved a contribution (tort indemnity) claim, as did *Galimi*, *Travelers*, and the other circuit precedents of the day.

II. This Important and Recurring Conflict Is Unlikely to Be Corrected Without This Court's Intervention.

This Court repeatedly has recognized the importance of its voice in the development of judge-made maritime law. The direct grant of jurisdiction over admiralty and maritime law found in Article III of the Constitution places this Court directly in charge of nurturing, developing, and protecting the general maritime law. "'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.'" *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 96 (1981) (quoting *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979)). Here, of course, this Court has already spoken (twice), both in a land-based case (*Lockheed*) and in an admiralty case (*Weyerhaeuser*), and it has held that FECA neither affected the rights of unrelated third parties nor disturbed settled rules of admiralty law. Normally, where a court of appeals decision displays an obvious lack of fidelity to precedents of this Court, one might well assume that the matter would be corrected by further developments in the lower courts. But such is not the case here because the Third Circuit is in very significant, and growing, company. The Third Circuit noted that after *Lockheed*, the "courts of appeals that have examined this issue have reached a uniform conclusion[.]" App. 16. There is a "consensus among the courts of appeals that have considered the issue" that "the United States's immunity from first-party liability destroys third-party contribution rights[.]" App. 22.

Just as occurred in the wake of *Weyerhaeuser* before this Court accepted certiorari in *Lockheed*, and although Congress has never quibbled with this Court's conclusion by acting to overrule it, the courts of appeal are again fairly uniform in their crabbed application of this Court's FECA holdings. The Third Circuit in this case comfortably followed the lead of the Fifth Circuit in its admiralty ruling in *Walls*. The Fifth Circuit believed that this Court's use of the language "directly" in *Lockheed* propelled its conclusion that FECA barred Walls' contribution claims "indirectly":

> Our holding shows why the Supreme Court stated 'that FECA's exclusive-liability provision does not *directly* bar a third-party indemnity action against the United States.' . . .In some cases, such as this one, the FECA has the effect of *indirectly* barring a third-party indemnity action; the Act takes away a derivative claim for contribution or indemnity.

958 F.2d at 71 (emphasis on "directly" supplied by Fifth Circuit).

The Fifth Circuit acknowledged that in some ways, its "reasoning is similar to that of the *Lockheed* dissent because much of the reasoning of then-Justice Rehnquist was based on an analysis of the substantive law," 958 F.2d at 72, but the Fifth Circuit was not dissuaded by this fact. Just as the Fifth Circuit in *Walls* concluded, and just as the Third Circuit concluded in this case, the dissent in *Lockheed* concluded that "where the third party's claim is an indirect action based on contribution or indemnity, Congress's clear intent to limit the liability of the United States should prevail." *Lockheed*, 460 U.S. at

203 (Rehnquist, J., dissenting). The Fifth Circuit in *Walls* mirrored the dissent's reasoning but stated that it did not believe that the "dissent's substantive analysis ha[d] been discredited[.]" 958 F.2d at 72.

The Fifth and Third Circuits are not the only circuits to have distinguished *Lockheed* based on this "indirect" route of substantive contribution analysis. In *Bush v. Eagle-Pitcher Indus., Inc.*, 927 F.2d 445, 450 (9th Cir. 1991), a case arising under the Federal Tort Claims Act ("FTCA") and the LHWCA, the Ninth Circuit handled *Lockheed* in *dicta* by limiting it to mean that while FECA's exclusivity provision "does not *directly* bar third-party indemnity claims against the United States," this Court "left open the possibility" that it might "*indirectly* bar third-party claims." 927 F.2d at 450 (emphasis original in *Eagle-Pitcher*).

Such severe undercutting of *Lockheed* is a matter that has been simmering unchecked for more than twenty years. The Third Circuit below also looked to the First Circuit's decision in *In re All Maine Asbestos Cases*, 772 F.2d 1023 (1st Cir. 1985), another FTCA and LHWCA case. Harkening back to the words of the Second Circuit in *Galimi* (before this Court accepted certiorari in *Lockheed*), the First Circuit lamented that, unfortunately, *Lockheed* did "not dispose of this FTCA thicket." 772 F.2d at 1029 n.7. Just as the Third Circuit did in this case (App. 22), the First Circuit looked to this Court's ruling in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). *Stencel* held that the *Feres* doctrine[4] did not permit third-party contribution claims where

[4] *Feres v. United States*, 340 U.S. 135 (1950).

the government enjoyed first-party immunity under the Veterans' Benefit Act. Believing that the FECA issue should be treated in parity with *Stencel*, the First Circuit stated: "For us to permit a vessel owner suit against the government in these circumstances would likely be 'to judicially admit at the back door that which has been legislatively turned away at the front door.'" 772 F.2d at 1029 n.7. (quoting *Stencel*). But the *Stencel* argument had been conclusively rejected by this Court in *Lockheed*. The government urged parity with *Stencel* in *Lockheed*, App. 93, and Justice Rehnquist's dissent in *Lockheed* relied heavily, not only on *Halcyon* and *Cooper*, but also on *Stencel*, 460 U.S. at 202, but the *Lockheed* majority rejected the *Stencel* analysis. 460 U.S. at 197 n.8. The First Circuit's ruling, just two years after *Lockheed* was handed down, quickly set the stage for infidelity to *Lockheed*.

The Third Circuit in this case also relied upon the ruling of the D.C. Circuit in *Eagle-Pitcher Indus., Inc. v. United States*, 937 F.2d 625 (D.C. Cir. 1991). The *Eagle-Pitcher* court rejected the notion that the claims before it arose in admiralty (they arose under LHWCA and FTCA). But "assuming *arguendo*" that the claims did arise in admiralty, *id.* at 634, the D.C. Circuit surveyed the interaction of FECA with the Suits in Admiralty Act and the Public Vessels Act, a point the parties had not briefed, inviting any party "to bring any flaws to our attention during the forty-five day period before the mandate in this case issues." *Id.* at 634 n.9. Without the benefit of briefing, the D.C. Circuit was swayed by this Court's decision in *Cooper*, which it over-read considerably. The D.C. Circuit focused upon the same critical passage in *Cooper* that the Second Circuit focused

upon thirty years ago in *Galimi*. The D.C. Circuit stated that this Court ruled in *Cooper* that *Halcyon* barred contribution "when a party is 'entitled to the protective mantle of [a statutory] limitation-of-liability provision.'" *Eagle-Pitcher*, 937 F.2d at 317 (quoting *Cooper*, 417 U.S. at 115). The D.C. Circuit substituted the language "[a statutory]" for the critical language "the Act's," which referred to a specific statute in *Cooper* — LHWCA. On this sleight-of-hand, the D.C. Circuit concluded erroneously: "In short, *Halcyon* and *Cooper Stevedoring* established that the maritime common law does not allow contribution against a party who holds a statutory immunity from first-party liability." 937 F.2d at 317.

In building a "consensus" of appellate authority, the Third Circuit also embraced its own ruling in *Eagle-Pitcher Indus., Inc. v. United States*, 846 F.2d 888 (3d Cir. 1988). The Third Circuit *Eagle-Pitcher* case, like the other *Eagle-Pitcher* cases, arose under the FTCA and the LHWCA. The Third Circuit held that the LHWCA created no right of action against the United States, so that the FTCA did not waive sovereign immunity. 846 F.2d at 893. That should have ended the analysis, but the Third Circuit added a footnote of *dicta* to say: "Nonetheless, we agree that our decision could have been based on the more indirect rationale advocated by the government," namely, that FECA provided immunity from the third-party claims. *Id.* at n.8.

There are a number of district court precedents that likewise conclude that it is improper for a third-party claimant to "accomplish *indirectly*" what FECA "directly bars." *GAF Corp. v. United States*, 1996 WL 422491, *11 (D.D.C. 1996). Most recently, applying *Walls*, *Halcyon*, *Cooper*, and the district court's ruling

below in this case, and rejecting *Wallenius* as "suspect" for predating *Lockheed*, the court in *North and South American Shipping v. United States*, 352 F.Supp.2d 734 (E.D. La. 2005), held that FECA barred a vessel owner who had been found liable for the death of a federal customs inspector from claiming contribution and indemnity against the United States. *Id.* at 743-746.

There is no contemporary counterweight to these decisions. The courts of appeal have recreated the same intolerable legal landscape that developed after this Court's ruling in *Weyerhaeuser* that required this Court's intervention. The Third Circuit's decision below rather boldly invokes the very same precedents presented in the certiorari petition in *Lockheed* and the Hruska Commission report and brazenly rejects the Fourth Circuit's decision in *Wallenius* as "unpersuasive" and "counter to the weight of authority." The petitioner in *Lockheed* sought certiorari, among other reasons, because the split of authority "encourage[d] forum shopping[.]" App. 72. Lockheed's petition noted that contribution claims may be asserted in separate proceedings, making forum shopping an appealing option. App. 72 n.11. Then, as now, the conflicting state of the law encourages litigants to forego asserting their contribution claims in the primary action and instead bring a separate (inefficient) proceeding against the United States – within the Fourth Circuit – on their contribution claims.

The time is ripe for intervention by this Court. In 1988, in the wake of *Lockheed*, Eagle-Pitcher unsuccessfully sought a writ of certiorari from this Court to review the Third Circuit's *Eagle-Pitcher* ruling. Eagle-Pitcher argued, as McAllister and

Global do here, that for FECA to enter the third-party analysis "*in*directly" is to render *Lockheed*'s holding "meaningless." Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, 1988 WL 1093920 *27-28 (Aug. 8, 1988) (emphasis original). In the decades since Eagle-Pitcher's petition was denied, the rulings making an end-run around *Lockheed* have continued to pile up. The time has come to grant the writ, restore the authority of *Lockheed* and *Weyerhaeuser*, and clarify that, whether directly or through the "indirect" means of defeating an otherwise valid claim, FECA does not immunize the government from third-party claims for contribution.

III. The Third Circuit Ignored This Court's Further Rulings in *Weyerhaeuser* and *Lockheed* That FECA Does Not Disturb Settled Admiralty Principles.

If the state of the law were not already in great disarray, the Third Circuit's ruling in this case compounds the problem by inexplicably ignoring an additional feature of *Weyerhaeuser*, in which this Court held that in passing FECA, not only did Congress have no concern "with the rights of unrelated third parties," but it also had no intention "to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases." 372 U.S. at 601. Accordingly, this Court held in *Weyerhaeuser* that the divided rule of damages that had been long-settled in admiralty was not undermined by FECA's exclusivity provision. This Court reiterated this *Weyerhaeuser* holding in *Lockheed*. 460 U.S. at 195.

The present case involves the chain of command in a towing operation where McAllister was bound to follow the "dominant mind" of the principal towing vessel, according to longstanding rules of admiralty. *See, e.g., Sturgis v. Boyer*, 65 U.S. 110 (1860); *The Margaret*, 94 U.S. 494 (1876); *Oil Transfer Corp. v. Westchester Ferry Corp.*, 173 F.Supp. 637, 640 (S.D.N.Y. 1958) (helper tug must be exonerated when under orders of a ship that was in charge of the navigation). The district court considered the matter and erroneously concluded that these principles did not fit within the "longstanding admiralty rule" strand of *Weyerhaeuser*. App. 43-44. Although the matter was raised at length on appeal, the Third Circuit failed to comment on this feature of *Weyerhaeuser* or its application to this case when it affirmed the district court's ruling. This confuses the law all the more, encouraging the government to continue to argue that *Weyerhaeuser* is of little or no moment outside of its particular facts. This significant misreading of admiralty law merits correction by this Court.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 04-3938 and 04-4109

IN RE: PETITION OF MCALLISTER TOWING AND TRANSPORTATION COMPANY, INC., AS OWNER OF THE TUGS IONA MCALLISTER AND JAMES MCALLISTER

McAllister Towing and Transportation Company, Inc.,
Appellant No. 04-3938

IN RE: PETITION OF MCALLISTER TOWING AND TRANSPORTATION COMPANY, INC., AS OWNER OF THE TUGS IONA MCALLISTER AND JAMES MCALLISTER

Owl International Inc. d/b/a/ Global Associates,
Appellant No. 04-4109

Appeals from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 02-cv-00858)
District Judge: Honorable Bruce W. Kaufman

Argued September 26,2005

Before: RENDELL, FUENTES and GARTH,
Circuit Judges.

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued on September 26, 2005. On consideration whereof, it is now here

ORDERED and ADJUDGED by this Court that the Order of the District Court entered on September 15, 2004, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court. Costs taxed against the Appellants.

ATTEST:

s/Kathleen Brouwer
Acting Clerk

Dated: December 21, 2005

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
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Circuit Judges.

(Filed: December 21, 2005)

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OPINION OF THE COURT

RENDELL, Circuit Judge.

In this case, we consider the impact of the exclusivity provision of the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8116(c), on third-party contribution claims against the federal government. Pursuant to this provision of FECA, a federal employee's recovery against the United States for injuries that he sustains on the job is limited to the fixed benefits to which he is entitled under the statutory compensation scheme. While the Supreme Court has twice held that the exclusivity provision does not, by its terms, bar contribution claims against the United States by third parties who are sued by such a federal employee, we must determine whether other principles apply to bring about such a bar in the case before us. The District Court held that these contribution claims against the United States were barred because the substantive right to contribution in the maritime law is unavailable where the party against whom contribution is sought enjoys statutory immunity from liability to the injured plaintiff. We agree with the District Court and will therefore affirm.[1]

I. Background

This case originates from a failed attempt to tow a retired United States Navy vessel, the USS GUADALCANAL, from the Navy Inactive Ship

[1] McAllister also appeals the District Court's dismissal of its contract-based claims for indemnification. We conclude that the District Court analyzed these claims properly, see In re McAllister Towing & Transp. Co., No. 02-858, 2004 WL 2009330, at *6-8 (E.D. Pa. Sept. 9, 2004), and need not discuss them in further detail here.

Maintenance Facility in Philadelphia to another Navy facility in Virginia. The Navy contracted with Owl Associates, Inc., doing business as Global Associates, Inc. ("Global"), McAllister Towing and Transportation Company, Inc. ("McAllister"), and various other private parties to assist in the tow. The USNS MOHAWK was assigned to do most of the towing. During the attempted tow, a portion of the MOHAWK's towing gear assembly broke off and struck Todd Bruemmer, a civilian seaman employee of the United States stationed aboard the USNS MOHAWK, in the side, causing injuries.

Bruemmer and his wife filed a personal injury suit against McAllister and other private parties involved in the tow in the Pennsylvania Court of Common Pleas of Philadelphia County. McAllister responded by filing a Petition for Exoneration from or Limitation of Liability in the District Court pursuant to Rule F of the Federal Rules of Civil Procedure Supplemental Rules on Admiralty and Maritime Claims, which stayed the state court proceedings. Bruemmer and his wife then refiled their claims against McAllister and others in the District Court. McAllister filed a third-party complaint against the United States and Global, the private contractor that arranged the tow, seeking contribution or indemnity for liability on the Bruemmers' claims. Global filed a cross-claim seeking contribution or indemnity against the United States, contending that the United States's negligence contributed to Bruemmer's injuries.

The Bruemmers did not name the United States as a defendant in either their state court or federal court complaint, presumably because the exclusivity provision of FECA immunizes the United States from tort claims by its employees. Like most workers' compensation statutes, FECA guarantees injured

federal employees "the right to receive immediate, fixed benefits, regardless of fault and without need for litigation" from their employer, i.e., the federal government, in exchange for statutory immunity from personal injury claims. Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 194 (1983). The relevant portion of the statute provides:

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

5 U.S.C. § 8116(c).[2]

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[2] Although the provision's last sentence appears to exclude Bruemmer, the Supreme Court has twice held that FECA's exclusivity provision applies to civilian seamen, effectively reading the last sentence out of the provision. See Johansen v. United States, 343 U.S. 427, 441 (1952) ("All in all we are convinced that the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels."); see also Patterson v. United States, 359 U.S. 495, 496 (1959) (per curiam) (declining to reconsider Johansen). The parties do not challenge this reading.

The United States moved the District Court for Judgment on the Pleadings on the contribution claims, arguing that FECA's exclusivity provision, described above, prohibited claims for contribution or indemnity against the United States that are based solely on the government's status as a joint tortfeasor. The District Court agreed and granted the government's motion. Analyzing the Supreme Court's decisions in Weyerhaeuser Steamship Co. v. United States, 372 U.S. 597 (1963), and Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983), the District Court found that this provision of FECA does not directly bar third-party contribution claims. Its inquiry did not end there, however, because it noted that the substantive law governing the underlying contribution claims may bar such claims. In re McAllister Towing & Transp. Co., No. 02-858, 2004 WL 2009330, at *4-5 (E.D. Pa. Sept. 9, 2004). The District Court concluded that, although the substantive law governing McAllister and Global's contribution claims, the maritime law, recognizes a right of contribution between joint tortfeasors, that right is unavailable where the tortfeasor against whom contribution is sought enjoys statutory immunity from first-party claims. Id. at *5 (citing Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952) and Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974)). Because FECA's exclusivity clause immunizes the United States from Bruemmer's personal injury claims, the Court concluded, application of the substantive law would result in protection of the United States from liability from third-party contribution claims arising out of those claims. Id. at *6.

II. Discussion

The District Court exercised jurisdiction over this

case pursuant to the Suits in Admiralty Act, 46 U.S.C. § 741, et seq., and the Public Vessels Act, 46 U.S.C. § 781, et seq. Our jurisdiction arises out of 28 U.S.C. § 1292(a)(3), which provides for appellate review of interlocutory decrees in admiralty that "determin[e] the rights and liabilities of the parties." Our standard of review of a dismissal under Fed. R. Civ. P. 12(c) is plenary, Hayes v. Cmty. Gen. Osteopathic Hosp., 940 F.2d 54, 56 (3d Cir. 1991).

On appeal, McAllister and Global take issue with each aspect of the District Court's analysis. First, they dispute the District Court's reading of Weyerhaeuser and Lockheed, arguing that those cases stand for the broad proposition that FECA's exclusivity clause was not intended to affect third-party rights. To allow FECA to "indirectly" bar such claims, they contend, violates the spirit of those decisions. Second, they challenge the District Court's analysis of the substantive contribution claim, urging that the Supreme Court cases on which the District Court relied in order to conclude that the maritime common law right of contribution does not allow recovery in this case do not apply.[3] We will address these

[3] Global also argues that the analogous liability provision of the Federal Tort Claims Act ("FTCA"), which allows private parties to hold the United States liable "in the same manner and to the same extent as a private individual under like circumstance," 28 U.S.C. § 2674, allows it to recover here. As we have previously held, however, a third party may not use the FTCA "to accomplish indirectly what federal employees could not accomplish directly." Eagle-Picher Indus., Inc. v. United States, 846 F.2d 888, 894 (3d Cir. 1988). We therefore decline to even consider whether Global would prevail in an analogous claim against a private party, as our case law precludes us from reaching a different result on FTCA grounds here.

arguments by reviewing the case law on which they rely.[4]

In Weyerhaeuser, Weyerhaeuser, a shipowner, sued the United States for damages that it suffered when its vessel collided with a United States Army vessel. The district court found that the collision resulted from the mutual fault of both ships, and applied the "settled admiralty rule of divided damages" in collision cases, which allows each party to recover one-half of provable damages and court costs from mutual fault collisions. 372 U.S. 597, 598 (1963). The issue before the Supreme Court was whether FECA's exclusivity provision prevented Weyerhaeuser from including a settlement paid to a federal civil service employee who was injured in the collision as part of its damage calculation for purposes of the "divided damages" rule.

The government contended that the language of the exclusivity provision foreclosing liability of the United States to "any other person otherwise entitled to recover damages" applied to preclude the shipowner's recovery of these costs from the United States in a divided damages case. The Court noted that this language followed specific categories of people related to the injured employee, and was not prepared to say that "any other person otherwise

[4] We note at the outset that, although many comparisons between FECA's exclusivity provision and limitations on employer liability in state workers' compensation schemes might be drawn, only federal case law is relevant to our task here. See Newport Air Park, Inc. v. United States, 419 F.2d 342, 347 (1st Cir. 1969) ("In the case of the FECA the immunity is federally created; its extent must be determined by the federal courts, particularly when the issue is one of governmental liability.").

entitled" opened Pandora's box to anyone who might have a claim. However, it thought the language confusing enough to warrant an examination of the legislative history. In so doing, it discovered that the purpose behind the exclusivity provision was limited:

> The purpose of s[ection] 7(b), added in 1949, was to establish that, as between the government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. There is no evidence whatever that Congress was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases.

Id. at 601. Accordingly, the Supreme Court found no bar against the shipowner's inclusion of the settlement paid to the injured employee in calculating its damages for purposes of the divided damages rule. Id. at 604.

Before Weyerhaeuser, we had held that the language of FECA's exclusivity provision barred a claim for contribution against the United States by a joint tortfeasor for damages paid to an injured government employee. See Drake v. Treadwell Constr. Co., 299 F.2d 789, 790-91 (3d Cir. 1962) ("Contribution of a joint tort-feasor toward the satisfaction of a covered government employee's judgment in tort seems as clearly within the language of Section 7(b) as is total direct liability to the injured employee."). The Supreme Court vacated our judgment and remanded the case for reconsideration in light of Weyerhaeuser. Treadwell Constr. Co. v. United States, 372 US. 772

(1963) (per curiam). The Court's remand order left us uncertain as to what to do in the next case before us. We explained our predicament in that case, Travelers Insurance Co. v. United States, where a private party sought indemnity or contribution from the United States for damages paid to an injured government employee:

> Federal courts are in hopeless conflict concerning the proper interpretation of the Weyerhaeuser and Treadwell decisions .... The principal source of this conflict is the broad language in Weyerhaeuser that "there is no evidence that Congress was concerned with the rights of unrelated third parties."

493 F.2d 881, 885 (3d Cir. 1974) (internal citations omitted).

To make sense of this conflict, we surveyed the ways that other courts, faced with this confusion, had reacted. Id. at 885-87. We noted that the Fourth Circuit Court of Appeals, in Wallenius Bremen G.m.b.H. v. United States, 409 F.2d 994 (4th Cir. 1969), had interpreted the Weyerhaeuser language about the rights of third parties to mean that contribution claims are to be affirmatively permitted. Travelers, 493 F.2d at 885-86. In Wallenius, the court found the government's personal defense to suit by an injured worker to be "irrelevant" to the question of its liability for contribution or indemnity claims. 409 F.2d at 998. Most courts, however, had read Weyerhaeuser more narrowly, as saying merely that the exclusivity provision did not create a bar. Under their reading, other principles might still operate to bar contribution claims. We summarized this position as follows:

> [S]ince the United States had no underlying

> tort liability to its injured employee, the exclusivity provision of the FECA precludes a third party action for contribution or indemnity unless there exists a relationship between the third party and the United States independent of the tortious event, such as the contractual obligation in Ryan . . . or the admiralty rule of divided damages in Weyerhauser, . . . upon which recovery can be grounded.

Travelers, 493 F.2d 886.

We found the opinion of the Court of Appeals for the Ninth Circuit in United Airlines v. Wiener, 335 F.2d 379 (9th Cir. 1964), particularly convincing.[5] There, the court rejected United's argument that the

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[5] Although our analysis in Travelers relied primarily on Wiener, we also referred to the opinions of a number of other courts that had considered this issue and reached the same conclusion. See, e.g., Newport Air Park, Inc. v. United States, 41 9 F.2d 342, 345, 347 (1st Cir. 1969) (reading Weyerhaeuser as limited to cases where the third party has a "direct right of action" against the government; holding that "contribution cannot be had from the government when the government was under no tort liability to the injured party"); Murray v. United States, 405 F.2d 1361, 1364-65 & n.12 (D.C. Cir. 1968) (acknowledging controversy over meaning of Weyerhaeuser and Treadwell, but affirming district court's dismissal of third-party contribution claim against the government "since contribution is an equitable doctrine imposing a duty on one tortfeasor to another that is applicable only when the tortfeasors have a concurring liability to the same victim"); Busey v. Washington, 225 F. Supp. 416, 421, 424 (D.D.C. 1964) (finding that the Supreme Court "made clear that its decision in the Weyerhaeuser case . . .was limited to admiralty cases involving mutual fault collisions, relying in part at least on the antiquity of the admiralty rule of divided damages"; entering judgment in favor of the United States on third-party contribution claim).

Supreme Court's remand in Treadwell indicated a repudiation of the well-settled principle that indemnity claims will fail where there is no underlying first-party liability. Id. at 404. Applying that principle, it found that the absence of an independent basis of liability from the government to United, the third party, was fatal:

> United's claim for indemnity is not based upon a duty owed by the government to United by virtue of a contract, attenuated or otherwise, or by operation of a rule of law such as the divided damage rule of admiralty. There being no underlying liability on the part of the government, United's claim for indemnity must fall.

Id. at 404, quoted in Travelers, 493 F.2d at 887. Finally, we noted that our own jurisprudence prohibited indemnity actions under the Longshoremen's and Harbor Worker's Compensation Act ("LHWCA"). See Brown v. Am.-Haw. S.S. Co., 211 F.2d 16, 18 (3d Cir. 1954) (holding that "there can be no action of indemnity" under the LHWCA "which is not based on the violation of some contractual duty"); Crawford v. Pope & Talbot, 206 F.2d 784, 792 (3d Cir. 1953) (concluding that LHWCA's exclusivity provision does not bar indemnity claims based on the contractual relationship between the employer and the third party because "in such cases the indemnity has a claim which is independent of and does not derive from the injury to the employee").[6] Based on our analysis, we held that the Travelers plaintiffs could not recover

[6] These cases were substantially abrogated by a subsequent amendment to the LHWCA, but, as we noted in Travelers, "their

(footnote continues)

from the United States on "contribution or noncontractual tort indemnity" claims for damages paid in a wrongful death and survival action brought by the widow of a deceased government employee. 493 F.3d at 887.

Nearly a decade after we issued our opinion in Travelers, the Supreme Court was asked to revisit the meaning of the language of FECA's exclusivity provision and clarify its implications. In Lockheed, it essentially held that there were no implications. Recounting its reasoning in Weyerhaeuser, it reinforced that ruling and stated that nothing in the exclusivity provision itself prevented or precluded recovery on any basis or theory by third parties against the government: "To the extent that the basis for the underlying cause of action could make any difference, the indemnity theories on which Lockheed relies are as well-established as the divided damages rule was in Weyerhaeuser." 460 U.S. at 198. Importantly, the Court affirmatively noted that the district court had determined that Lockheed did, indeed, have a right to indemnity under the "governing substantive law." Id. at 199.

In essence, the Court in Lockheed explained that Weyerhaeuser said only that the exclusivity provision was not directed at the situation of the third-party contribution claim-nothing more, nothing less. So we must look, instead, to the underlying cause of action and determine whether it is viable based on the state of the law, which can include general legal principles

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(footnote continued)
principles continue to retain vitality for purposes of analyzing the effect of the exclusive remedy provision of the FECA." 493 F.2d at 887 n.9.

as well as a particular statutory scheme. See Eagle-Picher Indus., Inc. v. United States, 846 F.2d 888, 892 n.6 (3d Cir. 1988) ("[T]he viability of. . . third-party actions depend[s] on the underlying substantive law."). Just as the divided damages rule in collision cases had established the principle whereby the damages paid to the injured worker were included in the calculation in Weyerhaeuser, so too the judicially recognized indemnity claim in the fact pattern in Lockheed provided the basis for Lockheed's claim against the government. Thus, the right to contribution or indemnity either does or does not exist as a matter of law, separate and apart from the exclusivity provision.

The courts of appeals that have examined this issue have reached a uniform conclusion, namely, that Lockheed did not, as Appellants contend, establish that the exclusivity provision never affects third-party rights; it merely directed courts to examine the underlying substantive basis of the third parties' claims. See, e.g., Walls Indus., Inc. v. United States, 958 F.2d 69, 71 (5th Cir. 1992); Eagle-Picher Indus., Inc. v. United States, 937 F.2d 625, 634 (D.C. Cir. 1991); Bush v. Eagle-Picher Indus., Inc., 927 F.2d 445, 451 n.9 (9th Cir. 1991); In re All Maine Asbestos Litig., 772 F.2d 1023, 1027 (1st Cir. 1985).

The substantive basis for Appellants' claims in this case is the right of contribution under maritime law. The Supreme Court explained the contours of this right more than a half- century ago in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952). There, an employee of Haenn Ship Ceiling & Refitting Corporation sustained injuries while he was repairing a ship owned by Halcyon Lines. The employee sued Halcyon, and Halcyon impleaded Haenn as a third-party defendant. We held that

Halcyon had a right of contribution, but that Haenn's liability was limited to the amount that it would have had to pay its employee if the employee had elected to claim compensation under the applicable workers' compensation statute, the LHWCA. Halcyon, 342 US. at 283 (citing Baccile v. Halcyon Lines, 187 F.2d 403 (3d Cir. 1951)).

Both parties contested our holding before the Supreme Court. Halcyon argued that it had a right to contribution based on the parties' relative degrees of fault, while Haenn disputed whether there was a right of contribution at all; at most, it urged, the right should be based on an equal division of damages in keeping with the admiralty law rule of divided damages that applies in collision cases. Id. at 284. The Court declined to recognize any right of contribution under the circumstances, concluding, in light of the myriad issues involved, and wary of upsetting the intricate schemes for apportioning liability that Congress had developed in the LHWCA and related statutes, that "legislative consideration and action can best bring about a fair accommodation of the diverse but related interests" of the carriers, shippers, employees, and insurance companies that had stakes in the existing statutory compensation scheme. Id. at 286. The Court accordingly concluded that "it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action." Id. at 285.

Later, however, in Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974), the Supreme Court recognized a maritime law right of contribution between a vessel and a stevedore in a non-collision context. Cooper arose out of injuries that a longshoreman sustained when he fell into a concealed

gap between crates on the vessel where he was working. The longshoreman sued the vessel, and the vessel filed a third-party complaint naming Cooper, the stevedore that had negligently loaded the crates onto the vessel. Importantly, Cooper was not the longshoreman's employer. The issue before the Supreme Court was whether the district court's award of contribution between the vessel and stevedore was cognizable under maritime law. Cooper, 417 U.S. at 107-09. The Court held that it was, but only after making certain to distinguish Halcyon. Id. at 111-13.

Cooper argued that Halcyon precluded the Court from recognizing a right to contribution in its case. Id. at 111. But the Cooper Court construed Halcyon narrowly, finding that the Court's decision in Halcyon was premised on Haenn's LHWCA immunity from liability to the injured plaintiff. See id. at 112. In Cooper, unlike Halcyon, neither party was immune from liability to the plaintiff-the LHWCA did not apply because the plaintiff was not an employee of the vessel or the stevedore. Because the injured longshoreman in Cooper could have held either party, or both, liable for his injuries, the Court held, it only made sense to allow the vessel to recover part of the total damage amount from the negligent stevedore. Id. at 113.

As the District Court here ably explained, In re McAllister Towing: & Transp. Co., No. 02-858, 2004 WL 2009330, at *5 (E.D. Pa., Sept. 9, 2004), the lesson of Halcyon and Cooper is that the maritime law right to contribution among joint tortfeasors in non-collision cases rests on a finding of concurrent responsibility. Cooper, 417 U.S. at 115. Where, as here, the party against whom contribution is sought cannot be held liable to the plaintiff, the basis for mutual responsibility, and thus for contribution, disappears.

McAllister argues that the District Court's reliance on Halcyon and Cooper was misplaced because the Lockheed Court dismissed those cases as "irrelevant." This argument misses the point: Halcyon and Cooper were irrelevant to the Court's analysis in Lockheed because they bear only on the parties' substantive contribution claims. As discussed above, that issue was not presented to the Lockheed Court because the district court had decided that there was a valid indemnity claim, and that determination was not contested on appeal. See Lockheed, 460 U.S. at 198 n.8 ("Since the validity of the substantive indemnity claim is not before us, [Halcyon and Cooper] . . . are entirely irrelevant."). Here, Halcyon and Cooper are relevant and, indeed, controlling on the substantive contribution law issue before us.

Global argues that Halcyon and Cooper are "inapplicable" to this case because they involve immunity from tort liability under LHWCA, not FECA. As Global points out, LHWCA specifically prohibits third-party claims, see Lockheed, 460 U.S. at 198, while FECA does not. But LHWCA was only amended to prohibit third-party liability in 1972; Halcyon was decided in 1952. The Supreme Court described LHWCA's exclusivity provision before the 1972 amendment as "nearly identical" to FECA's. Weyerhaeuser, 372 U.S. at 602. Thus, the 1972 amendments to LHWCA do not provide a legitimate basis for distinguishing Halcyon and Cooper from this case.

Post-Cooper case law reinforces our conclusion that Halcyon and Cooper foreclose Appellants' contribution claims here. As the District Court noted, "[a]lmost every circuit that has analyzed contribution law for joint tortfeasors . . . has applied the reasoning in

Cooper." In re McAllister Towing, 2004 WL 2009330, at *5. In fact, two courts of appeals have specifically held that the government's FECA immunity from suit by the underlying tort victim precludes third-party contribution actions based on the applicable substantive law. In Eagle-Picher Industries, Inc. v. United States, 937 F.2d 625 (D.C. Cir. 1991), the Court of Appeals for the District of Columbia Circuit, applying the Halcyon / Cooper rule, concluded that private third parties could not recover in contribution actions against the government for damages paid to federal shipyard workers covered by FECA because "under maritime common law [FECA's] statutory immunity from first-party liability shields the government . . . as well from third-party actions." Id. at 635. And the Court of Appeals for the Fifth Circuit upheld a district court's dismissal of a private party's contribution claim against the United States in a case with facts strikingly similar to the one before us. In Walls Industries. Inc. v. United States, 958 F.2d 69 (5th Cir. 1992), as in this case, the private party's contribution claim arose out of its liability for injuries that a federal civilian employee sustained while working on a United States vessel. Id. at 71-72. The court there reasoned that "[c]ontribution and indemnity are available only if the joint tortfeasors share a common liability to the plaintiff," id. at 71, and that no common liability existed in that case because FECA rendered "the United States . . . immune from suit by the first-party plaintiff." Id. at 72. While we have not had the opportunity to address the substantive contribution issue since Cooper, our pre-Cooper analysis of the issue (see Travelers, discussed above) actually anticipated Lockheed's directive to look to the underlying substantive law and the precise

approach to the substantive law question employed by the Courts of Appeals for the D.C. and Fifth Circuits in Eagle-Picher and Walls.

Appellants have cited only one case, Wallenius Bremen G.m.b.H. v. United States, 409 F.2d 994 (4th Cir. 1969), that supports their view that liability for contribution claims does not turn on the indemnitor's first-party liability to the injured person. We rejected that court's reasoning in Travelers and continue to find it unpersuasive now. First, as discussed above, Wallenius runs counter to the weight of authority, both before and after Cooper. See, e.g, Walls, 958 F.2d at 71-72; Eagle-Picher, 937 F.2d at 635; Travelers, 493 F.2d at 886-87; United Air Lines. Inc. v. Wiener, 335 F.2d 379, 403 (9th Cir. 1964). Second, and more importantly, Wallenius was decided five years before Cooper. Although the Supreme Court in Lockheed left the substantive indemnity law question open, it resolved that question, at least with respect to maritime law contribution claims, in Cooper. We are accordingly bound to apply Cooper here. Where the substantive law makes the existence or non-existence of the government's liability to the first party relevant, we cannot conclude, as the Fourth Circuit Court of Appeals did in Wallenius, that it is "irrelevant."

Finally, although the parties have not focused on the policy implications of this decision, we note that the result urged by the Appellants would undermine FECA's objectives. Like other workers' compensation schemes, FECA serves a dual purpose: "to provide for employees 'a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.'" Busey v. Washington, 225 F. Supp. 416, 423 (D.D.C. 1964) (quoting Bradford Elec. Light Co. v. Clapper, 286 U.S.

145, 159 (1932)). To further this second purpose, FECA contains a recoupment provision, 5 U.S.C. § 8132, which requires an injured employee who receives damages from a third party to refund any benefits he received under the statute to the United States. Allowing third parties to recover on contribution claims against the United States for damages paid to injured federal employees frustrates the purpose of the recoupment provision, see Newport Air Park, Inc. v. United States, 419 F.2d 342, 348 (1st Cir. 1969) (Coffin, J., concurring), and undermines the entire statutory scheme by subjecting the United States to unlimited and indeterminate liability for injuries to its employees. Busey, 225 F. Supp. at 423. Cf. Stencel Aero Engineering Cog. v. United States, 431 U.S. 666, 673 (1977) (finding that to permit third-party recovery on an indemnity claim against the United States for benefits paid to an injured National Guard officer would circumvent the limitation-of-liability provisions of the Veterans' Benefit Act, a "statutory 'no fault' compensation scheme" similar to FECA). Appellants have advanced no compelling justification for subverting the statutory scheme in this way.

Given the Supreme Court's directive in Cooper that the maritime law right to contribution is dependent on the indemnitor's first-party liability, the consensus among the courts of appeals that have considered the issue and found that the United States's immunity from first-party liability destroys third-party contribution rights, our own, pre-Cooper analysis of this issue, and our understanding of the purpose of FECA's exclusive liability provision, there is no basis on which we would break new ground here. We agree with the District Court that Appellants' remedies against the United States depend on the United

States's liability for the underlying injury. Because FECA immunizes the United States from such liability, there can be no claim for contribution as a matter of law.[7]

III. Conclusion

For all of the reasons discussed above, we conclude that the District Court's grant of the United States' Motion for Judgment on the Pleadings was proper. We will accordingly affirm the District Court's order.

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H

Motions, Pleadings and Filings

United States District Court,
E.D. Pennsylvania.
In re Petition of MCALLISTER TOWING AND TRANSPORTATION COMPANY, INC., as Owner of the Tugs, and Iona McAllister and James McAllister, for Exoneration from or Limitation of Liability
No. Civ.A. 02-858.

Sept. 9, 2004.

Gregg A. Cervi, U.S. Dept of Justice, Washington, DC, Raymond T. Letulle, Cozen & O'Connor, Robert A. Klein, Conrad O'Brien Gellman & Rohn PC, Jeffrey Steven Moller, Blank Rome Comisky & McCauley LLP, Stephen Weaver, Philadelphia, PA, for Defendants.

C. Arthur Rutter, III, Rutter Walsh Mills & Rutter, Norfolk, VA, Charles E. Schaffer, Laurence S. Berman, Levin, Fishbein, Sedran & Berman, Stephen G. Rhoads, Montgomery McCracken Walker & Rhoads LLP, James W. Johnson, Hollstein Keating Cattel, Matthew H. James, Braverman Daniels Kaskey, A. Robert Degen, Rothschild O'Brien & Frankel LLP, Mindee J. Reuben, Fox Rothschild L.L.P., Philadelphia, PA, for Claimants.

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MEMORANDUM

KAUFFMAN, J.

***1** Before the Court are the Motion of Third-party Defendant United States for Judgment on the Pleadings and Motions for Summary Judgment by Owl International, Inc., d/b/a Global Associates ("Global"), McAllister Towing and Transportation Company, Inc. ("McAllister"), Oil States International, Inc. ("Oil States") and Marinette Marine Corp. ("Marinette"). For the reasons that follow, the Motion of the United States will be granted, Global's Motion for Summary Judgment will be denied, McAllister's Motion for Partial Summary Judgment will be denied, and the Motions for Summary Judgment of Marinette and Oil States will be granted.

I. Background

The United States Navy ("Navy") keeps many of its decommissioned ships at the Navy Inactive Ship Maintenance Facility ("NISMF") in Philadelphia. Third-party Complaint of McAllister Towing and Transportation Co. ("Complaint") at ¶ 7. The Navy contracted with Global to have one of those ships, the *ex-USS Guadalcanal*, towed to the Navy's James River facility at Hampton Roads, Virginia. Complaint at ¶ 9.

Global arranged to have the *USNS Mohawk*, one of the Military Sealift Command's ocean-going tugs, do the bulk of the towing. However, the job also required smaller tug-boats to guide the *Guadalcanal* from its

slip. Global subcontracted with McAllister to provide two additional tug-boats for the job. Complaint at ¶ 8--14. Global also engaged docking master Curt Chamberlain and two licensed river pilots, Earl Eggers and J. Ward Guilday. [FN1] Complaint at ¶ 14.

FN1. Eggers and Guilday were initially named as parties in this action, but were dismissed by stipulation on March 16, 2004.

Claimant Todd Bruemmer was a civilian employed by the U.S. Government, and was stationed aboard the USNS Mohawk. Complaint at ¶ 16. The Master of the Mohawk was Captain Garrett Wanzor. Complaint at ¶ 16.

During the tow of the *Guadalcanal*, stress on the tow lines of the *Mohawk* increased, eventually causing the tow guide assembly to break apart with significant force. *See* USNS Mohawk Mishap Investigation Report ("Mishap Report") at ¶¶ 3K-3L. The top of the tow-guide assembly was projected into the air and then struck Bruemmer in the side, causing injuries. [FN2] *Id.* at ¶¶ 3M-3O. The U.S. Navy investigation report concluded that the incident was caused by a series of lapses in judgment by Capt. Wanzor, a federal employee. *See* Mishap Report at ¶¶ 5-6.

FN2. It is alleged that Bruemmer suffered an open left femur fracture, open right tibia and fibula fractures, and abdominal compartment syndrome.

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McAllister Towing filed this action pursuant to Rule F of the Federal Rules of Civil Procedure Supplemental Rules on Admiralty and Maritime Claims, which allows suit in a federal forum and provides for a stay of state proceedings. [FN3]

FN3. At the time of the filing of this action, a state case filed by Claimants Todd and Leslie Bruemmer was pending. Proceedings in that case were stayed by Order of the Court on February 20, 2002.

II. Legal Standard

Motion for Judgment on the Pleadings

A motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) is subject to the same standard as a motion to dismiss under Fed.R.Civ.P. 12(b)(6). *Haines v. Metro. Life Ins. Co.*, 94 Fed. Appx. 956, 958 (3d Cir.2004); *Turbe v. Government of Virgin Islands*, 938 F.2d 427, 428 (3d Cir.1991). Under that standard, the Court must "accept as true all of the factual allegations in the complaint as well as the reasonable inferences that can be drawn from them." *Doe v. Delie*, 257 F.3d 309, 313 (3d Cir.2001). Dismissal is appropriate only where the Court finds that the facts the plaintiff has pleaded cannot, under any circumstances, support the relief it is requesting. *Id.*

Motion for Summary Judgment

***2** In deciding a motion for summary judgment,

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"the test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56; *Med. Protective Co. v. Watkins*, 198 F.3d 100, 103 (3d Cir.1999) (citing *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir.1994)). "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 US. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court must examine the evidence in the light most favorable to the non-moving party and resolve all reasonable inferences in that party's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). However, "there can be 'no genuine issue as to any material fact' ... [where the non-moving party's] complete failure of proof concerning an *essential element* of [its] case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (emphasis added).

III. Analysis—Motion for Judgment on the Pleadings

The Government's motion for judgment on the pleadings ultimately rests on its contention that the United States is immune from the actions in this case under the Federal Employees Compensation Act ("FECA"), 5 U.S.C. § 8101 *et seq*. The Government's

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claim of immunity is based on FECA's exclusive liability provision, 5 U.S.C. § 8116(c), which is designed to insulate the federal government from liability for injuries covered by the Act. *See* United States' Memorandum in Support of Motion for Judgment on the Pleadings at 2.

McAllister, in turn, argues that the United States lacks immunity because the exclusive liability clause does not apply to a seaman like Bruemmer. McAllister's Memorandum in Opposition to Motion for Judgment on the Pleadings at 7. McAllister and the other cross-claimants argue in the alternative that the United States' immunity under FECA is limited to Bruemmer's suit, and does not apply to third parties like themselves suing the United States for indemnification or contribution.

A. *Whether FECA Prevents Bruemmer from Suing the United States*

FECA's exclusivity clause reads as follows:

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or

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> the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

*3 5 U.S.C. § 8116(c). [FN4]

> FN4. It is undisputed that the United States has been paying compensation under FECA to claimant Bruemmer.

McAllister argues that the final sentence of § 8116(c) has the effect of withholding immunity from the United States when the injured federal employee is a seaman. McAllister, in other words, reads the last sentence of § 8116(c) to mean that the United States is immune from all federal employee work-injury suits, *except* those brought by seamen. McAllister's Memorandum in Opposition to Motion for Judgment on the Pleadings at 7. Just as the United States is not immune from a suit by Bruemmer, McAllister argues, neither is it immune from McAllister's third-party suit for indemnity.

Although McAllister's reading seems to track the plain text of the statute, it was rejected by the Supreme Court, which ruled, based on legislative history, that "the Federal Employees Compensation

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Act is the *exclusive remedy* for civilian ... employees of the United States on government vessels engaged in public service." *Patterson v. United States*, 359 US. 495, 496, 79 S.Ct. 936, 3 L.Ed.2d 971 (1959) (emphasis added); *see also Johansen v. United States*, 343 U.S. 427, 441, 72 S.Ct. 849, 96 L.Ed. 1051 (1952) ("[W]e are convinced that the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels"). Circuit courts have subsequently applied *Patterson*, and held that FECA gives the United States immunity from suits arising out of employment-related injury. *See, e.g.; Cox v. Dravo Corp.*, 5 17 F.2d 620, 623 n. 3 (3d Cir.1975); *Turner ex re1 Turner v. Tennessee Valley Authority*, 859 F.2d 412, 414-15 (6th Cir.1988) ("The lower federal courts [since] *Johansen and Patterson* ... have held, uniformly, that persons for whom the Government has supplied an administrative compensation remedy are precluded from seeking recovery against the United States for injuries received in the course of their work under the Federal Tort Claims Act, the Jones Act, or the Public Vessels Act").

Thus, as a result of the *Patterson* holding, § 8116(c) immunizes the United States against seamen suits just as it does against those by other federal employees. Accordingly, the Court rejects McAllister's argument that the FECA exclusive liability clause is inapplicable in this case and holds that the United States is immune from suit by Bruemmer.

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B. *Whether the United States is Immune from Third-Party Tort Claims*

Alternatively, McAllister and the other third-party plaintiffs against the United States ("third-party plaintiffs") argue that while FECA may insulate the United States from suit by Bruemmer, the statute does *not* immunize the United States from third-party suits for contribution or indemnity. They argue that the immunity that FECA's exclusive liability provision confers on the United States is limited: it applies only to federal employees. But if the employee sues third parties, those third parties can seek indemnity from the United States in accordance with the government's responsibility for the accident. That way, the third parties do not have to bear the full legal burden of an accident that is not entirely their fault.

1. *The Weyerhaeuser and Lockheed cases*

***4** Third-party plaintiffs cite two Supreme Court cases: *Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597, 83 S.Ct 926, 10 L.Ed.2d 1 (1963) and *Lockheed Aircraft Corp, v. United States*, 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983). *Weyerhaeuser* involved a collision between a U.S. Army Dredge Ship and a civilian vessel, in which a United States civil service employee was injured. 372 U.S. at 598. The federal employee sued Weyerhaeuser, the owner of the civilian vessel, because the United States was immune under FECA. Weyerhaeuser, in turn, sued the United

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States for contribution. Despite the Government's arguments to the contrary, the Supreme Court found that "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties...." *Weyerhaeuser S.S. Co. v. United States*, 372 US. at 601 (1963). Accordingly, the Court found, the United States' immunity from suit by its employee did not extend to Weyerhaeuser, and Weyerhaeuser's suit for contribution could go forward on the merits.

In *Lockheed*, a civilian federal employee was killed in a United States Air Force plane crash. The administrator of her estate subsequently brought suit against the Lockheed Aircraft Corporation ("Lockheed"). Lockheed, in turn, brought a third-party action against the United States. The Government fully admitted responsibility for the accident, but claimed immunity under § 8116(c) of FECA. *Lockheed*, 460 U.S. at 191--192. The Court began its analysis by noting that while § 8116(c) strips federal employees of their right to sue the government, they get something in return: namely the worker's compensation benefits that FECA confers. The Court then went on to hold that "Section 8116(c) was intended to govern only the rights of employees, their relatives, and people claiming through or on behalf of them. These are the only categories of parties who benefit from the 'quid pro quo' compromise that FECA adopts." Accordingly, the United States was not immune from suit by Lockheed. *Lockheed*, 460 US. at 196.

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Third-party plaintiffs contend that *Weyerhaeuser* and *Lockheed* together establish that the United States is not immune from third-party suit in these circumstances, and that the Government's Motion for Judgment on the Pleadings should, accordingly, be dismissed.

The problem, however, is that there is more to the *Weyerhaeuser* and *Lockheed* holdings than third-party plaintiffs acknowledge. While the *Lockheed* Court explicitly held that the exclusion of liability clause does not bar third-party actions, it did not go so far as to say that third-party claims against the government in these circumstances are always viable. The Court was careful to note that

> [t]he District Court held that Lockheed had a right to indemnity under the governing substantive law, but the Court of Appeals did not rule on that question. Accordingly, we do not consider it. We adhere to the decision in *Weyerhaeuser*, and hold only that FECA's exclusive Liability provision ... does not *directly* bar a third-party indemnity action against the United States

***5** *Lockheed*, 460 US. at 199 (emphasis added). The implication of the statement is clear: while FECA's exclusive liability provision does not *directly* bar a third-party action, it may do so *indirectly*, depending on the underlying substantive law. The question, thus,

is not whether FECA's exclusive liability clause immunizes the Government from third-party contribution actions, but how the Government's immunity figures into the analysis of such actions. *See Eagle-Picher Indus., Inc. v. United States*, 846 F.2d 888, 893, n. 8 (3d Cir.1988) ("Although the FECA does not directly bar this third-party suit ... the immunity it creates against suits by federal employees is a significant circumstance that we would have to consider[.]"); *Walls Indus., Inc, v. United States*, 958 F.2d 69, 71 (5th Cir.1992) ("The question becomes whether [third-party plaintiff] has a cause of action under the substantive law."); *Eagle-Picher Indus., Inc. v. U.S. GAF Corp.*, 937 F.2d 625, 634 (D.C.Cir.1991) ("Instead, to determine the availability of [third-party] actions, we must look to the 'underlying substantive' law."). Accordingly, the Court will now turn its attention to the underlying substantive law of the third-party plaintiffs' contribution and indemnity actions.

2. *The underlying substantive law of the indemnity and contribution actions*

Maritime common law does recognize a right of contribution between joint tort-feasors. *Eagle-Picher Indus., Inc. v. United States GAF Corp.*, 937 F.2d 625, 635 (D.C.Cir.1991). However, there are important limitations. Two Supreme Court opinions, *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 US. 282, 72 S.Ct. 277, 96 L.Ed. 318 (1952), and *Cooper*

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Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974) clearly establish the rule that there can be no third-party suit against a joint tort-feasor where the tortfeasor has statutory immunity from the first-party plaintiff. [FN5] The rule's application to this case is straightforward: Bruemmer is suing the third-party plaintiffs for the injuries he suffered in the towing of the ex-*USS Guadalcanal*; under the *Cooper* case, third-party plaintiffs cannot force the United States to help pay for the damages they may owe Bruemmer, since FECA's exclusive liability clause bars Bruemmer from suing the United States. The third-parties, in other words, cannot compel the United States to pay damages for Bruemmer's injuries where Bruemmer could not have done so.

> FN5. Numerous courts have applied this rule to the United States' immunity from first-party plaintiffs under FECA. See the cases cited immediately *infra*.

Almost every circuit that has analyzed contribution law for joint tortfeasors, including the Third Circuit, has applied the reasoning in *Cooper*. *See Eagle-Picher Indus., Inc. v. United States*, 846 F.2d 888, 894 (3d Cir.1988) (third-party plaintiffs cannot "accomplish indirectly what federal employees could not accomplish directly"); *Travelers Ins. Co. v. United States*, 493 F.2d 881, 887 (3d Cir.1974); *Walls Indus., Inc. v. United States*, 958 F.2d 69, 71 (5th Cir.1992) ("If

one tortfeasor is not liable to the plaintiff (e.g., because of a worker's compensation statute), it is not liable for contribution or indemnity either."); *Eagle-Picher Indus., Inc. v. United States GAF Corp.*, 937 F.2d 625, 635 (D.C.Cir.1991) ("In short, *Halcyon* and *Cooper* established that the maritime common law does not allow contribution against a party who holds a statutory immunity from first-party liability.").

***6** Only the Fourth Circuit has recognized a tort-based indemnity right against a tortfeasor who is immune from first-party liability. *See Wallenius Bremen v. United States*, 409 F.2d 994, 998 (4th Cir.1969). This Court, however, does not find the *Wallenius* case, on which Global places so much weight in its brief, persuasive. First, *Wallenius* fails to consider the *Cooper* decision, which so clearly states that a joint tortfeasor's third-party liability is contingent on the underlying first-party liability. Second, *Wallenius* was decided fourteen years before *Lockheed*, where the Supreme Court emphasized that the United States' immunity could be relevant to the third-party contribution analysis. Finally, the overwhelming weight of authority goes against *Wallenius*. Every other circuit, including the Third, has followed *Cooper* in holding that there is no right to contribution or indemnity against a joint tortfeasor when the tortfeasor has immunity against the first-party plaintiff.

In sum, while FECA's exclusive liability clause

does not *directly* bar third-party suits against the United States, it does figure into the analysis of the underlying substantive law in such suits. Under that analysis in this case, the third-party plaintiffs' tort-based actions for contribution and indemnity are contingent on the United States' first-party liability to Bruemmer. Accordingly, since Bruemmer has no tort claim against the United States, neither do the third-party plaintiffs.

C. *Underlying Causes of Action in Contract*

Because the foregoing analysis applies only to tort claims, third-party plaintiffs can still receive indemnification from the United States if they can identify an underlying cause of action based on contract law. *See Travelers Ins. Co, v. United States*, 493 F.2d 881, 887 (3d Cir.1974) (holding that FECA's exclusive liability provision precludes tort-based but not contract-based actions against the United States). Here, third-party plaintiffs raise several *contract-based* theories under which they claim that the Court could order indemnification.

1. *The Implied Warranty of Workmanlike Performance*

Although they concede that there is no express contractual warranty of workmanlike service, McAllister, Marinette, and Chamberlain argue that they should be indemnified based on the United States' breach of the *implied* warranty of workmanlike service. *See generally Ryan Stevedoring v. Pan-*

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Atlantic S.S. Corp, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed 133 (1956); *see also Fairmont Shipping Corp. v. Chevron Int'l Oil Co.*, 511 F.2d 1252 (2d Cir.1975). They contend that when the United States (through its agent, Global) hired McAllister to perform tugging operations, the United States impliedly promised McAllister that it would provide safe conditions for the operation. Stated another way, third-party plaintiffs are asking this Court to hold that the towing contract included an implied warranty of workmanlike performance under which the United States had an obligation to ensure that McAllister would be able to safely perform its work. Memorandum of McAllister Towing in Opposition to Government's Motion at 14.

***7** However, as the Government points out, applying the warranty of workmanlike performance to the United States' contract with McAllister would be an expansion of the doctrine, without precedential support.

The Supreme Court first recognized the warranty of workmanlike performance in *Ryan*. However, the doctrine's clearest articulation can be found in *Fairmont Shipping Corp. v. Chevron Int'l Oil Co., Inc.*, 51 1 F.2d 1252 (2d (Cir.1975). The *Fairmont* court explained that the elements for the warranty are as follows:

> a shipowner, relying on the expertise of another party (the contractor) enters into a contract

> whereby the contractor agrees to perform services without the supervision or control by the shipowner; the improper, unsafe or incompetent execution of such services would foreseeably render the vessel unseaworthy or bring into play a pre-existing unseaworthy condition; and the ship-owner would thereby be exposed to liability regardless of fault. Where these elements are present, there will be implied in the contract an agreement by the contractor to indemnify the shipowner for any liability it might incur as a result of an unseaworthy condition caused or brought into play by the improper, unsafe or incompetent performance of the contractor.

Fairmont, 511 F.2d at 1258. That these elements are controlling in the present case is clear. Both the Government and McAllister cite *Fairmont* as authority. *See* Government's Reply Memorandum at 10; Memorandum of McAllister Towing in Opposition to Government's Motion at 17. Moreover, the *Fairmont* elements are cited in virtually every case analyzing the application of the warranty. *See, e.g., Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1243 n. 10 (3d Cir.1977); *Stevens v. East-West Towing Co., Inc.*, 649 F.2d 1104, 1108--1109 (5th Cir.1981).

A review of the *Fairmont* elements reveals that this is *not* the standard case to which the warranty of workmanlike performance has been applied. As those

elements make clear, the warranty of workmanlike performance is something the hired contractor owes to the ship-owner. Third-party plaintiffs, however, have asked the Court to apply the warranty in the other direction--*from* the United States, which owns the ship in question *to* the tugboats it hired.

Third-party plaintiffs have failed to cite a single case in which the warranty runs from the vessel owner to the contractors. Instead, McAllister attempts to anchor its case for implying the warranty in *Stevens v. East-West Towing Co., Inc.*, 649 F.2d 1104, 1108--1109 (5th Cir.1981). McAllister claims that "*Stevens* presents a factual situation which is almost identical to the case at bar." McAllister Opposition at 18. In fact, the cases are not as "identical" as McAllister suggests. They differ in at least one fundamental respect: in *Stevens*, it was the ship-owner seeking indemnity from the towing company rather than the other way around. To that extent, the case is inapposite.

*8 This distinction between this case and all the cases third-party plaintiffs have cited as precedent is not trivial. Indeed, the direction of the warranty is one of its fundamental characteristics. As the *Fairmont* court explained, the reason the Supreme Court imposed the warranty in the first place had to do with the shipowner's strict liability for workers' injuries, under which the shipowner was liable for all damages, even if the shipowner's contractor was ultimately the party responsible for the accident. *Fairmont*, 511 F.2d

at 1257 ("This court has more than once recognized that it is the shipowner's strict liability for unseaworthiness that rests at the heart of *Ryan* indemnity.") That rationale is absent here. McAllister and the other third-party plaintiffs are not subject to strict liability (with the possible exception of Marinette Marine). [FN6] The damages for which they are liable will, accordingly, correspond to their fault. Hence, the justification for applying the warranty is absent in this case.

> FN6. That Marinette Marine faces strict liability is not sufficient reason for implying a warranty of workmanlike performance in light of the complete absence of precedential support for implying a warranty of workmanlike performance owed *by* the owner of a ship (the United States) *to* the company that built that ship.

Furthermore, this is a warranty that "*services* will be performed in a *workmanlike* manner." *Cooper v. Loper*, 923 F.2d 1045, 1050 (3d Cir.1991) (emphasis added). The clear implication is that this warranty applies to the party performing the services, not the party benefitting from them. What is warranted is that those services will be conducted in a workmanlike manner, not that workmen will be provided the means of performing their services.

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2. *Dominant Mind and Servant*

Next, McAllister argues that it is entitled to indemnity because the Navy was the "dominant mind" in the tow. *See* McAllister Opposition at 19. Where a tug is a mere servant, obeying the orders of a "dominant" tug or other vessel, it is *not liable* for any damages caused by its actions pursuant to those orders. *The Connecticut*, 103 U.S. 710, 712, 26 L.Ed. 467 (1880) ("So far as the [servant tug] is concerned, she was clearly not to blame. She was the mere servant of the [dominant tug], and could exercise no will of her own"); *In re Walsh, et al.*, 136 F. 557, 559 (5th Cir.1905) ("As the [servant tug] was not responsible for the proper navigation of the fleet, and in all respects complied with the laws and regulations applicable to her handling and management in the premises, and in no way by her own fault contributed to the collision, she ought not to be held responsible for faults, if there were any, in the navigation...."); *Moran Towing & Transp. Co. v. Empresa Hondurena De V.*, 194 F.2d 629, 632 n. 3 (5th Cir.1952) (collecting cases).

However, McAllister's assertion that it was not the dominant mind in the towing operation cannot support a cause of action for indemnification. [FN7] The argument speaks to McAllister's *liability*, but is irrelevant to whether the United States is contractually obligated to indemnify McAllister for any damages it might have to pay. Accordingly, McAllister's dominant mind argument does not defeat

the Government's motion.

> FN7. There is at least one towing case in this District in which the court ordered indemnification. *See Consolidated Rail v. Lagada Beach*, 1983 AMC 1242 (E.D.Pa.1982). However, in *Consolidated Rail*, indemnification was ordered pursuant to an express contractual provision.

***9** In sum, third-party plaintiffs cannot make out a viable claim for indemnity or contribution based on either tort or contract theory. Accordingly, the Government's Motion for Judgment on the Pleadings will be granted..

IV. Motion for Summary Judgment by Global Associates

Global moves for summary judgment, arguing that it had no duty to call a pre-tow conference and that, in any case, its failure to do so did not cause Bruemmer's injuries.

A. *Whether Global Had a Duty to Call a Pre-Tow Conference*

It is undisputed that the Navy contracted with Global to "furnish direct labor, supervision, administrative support, materials and supplies, vehicles, tools and equipment as specified [in its contract] to operate and maintain the Naval Inactive Ship Maintenance Facility (NISMF) at Philadelphia."

Solicitation N00140-96-R-K013 ("Solicitation"), Attached as Exhibit L to McAllister Towing's Memorandum of Law in Opposition to Global's Motion for Summary Judgment ("McAllister Opposition") at 17. Global was to provide the "direct labor, supervision, and administrative support for the receipt, inactivation activation, maintenance and disposal of all vessels assigned to the NISMF." Solicitation at 33. Global's project manager was "responsible for the overall project operations of the NISMF Philadelphia, PA," although he had to report to the Navy's chief officer at the NISMF. Solicitation at 52.

Global contends that because its actions were subject to Navy approval and were undertaken at the Navy's direction, it was merely the Navy's agent. Accordingly, Global argues that it had no duty of reasonable care to call a pre-tow conference absent the Navy's specific request that it do so. However, the evidence could lead to the opposite inference. Global routinely called pre-tow meetings, which its representatives attended and at which they participated in planning the tow. [FN8] Although the fact that Global had called previous meetings is not conclusive evidence that it had a duty to do so, it could support that inference. Furthermore, Global's representative was given copies of the orders transmitted to the Navy's executive at NISMF, which made it clear that a pre-tow conference should be held.

See COMLOGRON TWO, attached as Exhibit B to McAllister Opposition (stating that the NISMF was to obey relevant U.S. Navy protocols, including the US. Navy Towing Manual, in handling the tow). [FN9] A reasonable trier of fact could conclude that the transfer of these orders was intended as a specific request that Global hold such a conference, since Global handled many of the duties that COMLOGRON TWO ordered the NISMF to perform. [FN10] Global's failure to fulfill the Navy's request also could then support an inference that Global failed to satisfy its duty of care.

FN8. *See* Deposition of Charles Curtis Chamberlain ("Chamberlain Dep."), attached as Exhibit F to Global's Reply Memorandum in Support of its Motion for Summary Judgment ("Global Reply") at 235 ("My understanding was Global always called the meetings"); Deposition of Charles Walker ("Walker Dep."), Attached as Exhibit B to Charles Curtis Chamberlain's Memorandum in Opposition to Global's Motion for Summary Judgment ("Chamberlain Memorandum") at 47, 51-54 (Global's representative "called the pilots to come to the conference"); Deposition of Frank Huesser, Attached as Exhibit D to McAllister Opposition at 55 ("The meetings were held by Global. Global called us up and told us there was a meeting"). Global asserts that it only called

these meetings when instructed to do so by the Navy.

FN9. The Towing Manual provides that "[t]he pre-tow planning and preparations must be conducted each time a towing task is undertaken ...." U.S. Navy Towing Manual, attached as Exhibit G to McAllister Opposition at A-4.1.4; *see also* Towing Manual at A-4-3. 1 ; A-4.1.3.

FN10. COMLOGRON TWO instructed the Navy commander to requisition "pilots, tugs ... and sufficient number of steerage tugs." COMLOGRON TWO at B(3). However, it was Global that hired the McAllister tugs, specifying both the number and type of tugs to be used. *See* McAllister Sub-contract, attached as Exhibit A to McAllister Opposition; Memorandum of 10/15/99, attached as Exhibit K to McAllister Opposition. Global also arranged for the pilots to be hired, through *its* sub-contract with McAllister. *Id*. Global even handled bidding and negotiation with the tugs contracted to handle the towing of the *Guadalcanal* from Pennsylvania to Virginia. *See* Exhibit O to McAllister Opposition. There is no indication on the record that it consulted with the Navy on its selections of tugs and pilots or that the Navy had the final say, other than approving the extra funds necessary to

> hire the pilots and the tugs transporting the Guadalcanal to Virginia. *See id.* Exhibits 4 and 5 to McAllister's Motion for Partial Summary Judgment.

In sum, Global exercised control over the day-to-day operations of the NISMF, including performing many of the duties initially assigned to NISMF's Navy executives. It is not clear from the evidence whether Global, the Navy, or both would have had the ultimate responsibility for scheduling the pre-tow conference. Resolving all inferences against the moving party, the Court finds that a reasonable trier of fact could conclude that Global had a duty to call such a meeting. Accordingly, summary judgment will be denied.

B. *Whether the Absence of a Pre-Tow Conference Caused Bruemmer's Injuries*

***10** Global also argues that there is no factual basis for concluding that a pre-tow conference would have averted the accident. Global avers that the individuals who would have been present at the conference have testified that they would not have made comments that would have prevented the injuries. *See* Global Reply at 7-9. However, it is undisputed that the river current and towing procedures are routinely discussed at pre-tow conferences. Insofar as confusion over towing procedure and questions about how to cope with the current were both significant factors in the accident, a

reasonable fact-finder could conclude that Global's failure to hold a pre-tow conference where those issues could be discussed contributed to Bruemmer's injuries. *See* Mishap Report at ¶¶ 85-88, 146; Opinion section of Mishap Report 3(c); Conclusion of Mishap Report; Mishap Investigation Report at 6, 11.

Furthermore, the Navy's report on the incident concluded that the failure to hold a pre-tow conference was part of the "series of errors" resulting in "incomplete preparation and pre-planning." Command Investigation of Roy Nixon, 11/4/99, attached as Exhibit E to McAllister Opposition at 38. Finally, before the Court is the affidavit of a docking master with over two decades of experience who has asserted that "the failure to hold a pre-tow conference was ... a breach of the custom, practice, and standard of care exercised by merchant mariners in the United States," and that "the accident and injuries suffered by Todd Bruemmer could well have been avoided if [Captain] Wanzor had the benefit of a pre-tow meeting." Affidavit of William E. Clifford, attached as Exhibit P to McAllister Opposition, at ¶¶ 4, 10. Accordingly, a material issue of fact exists as to causation, and summary judgment will be denied.

V. Marinette and Oil States's Motions for Summary Judgment

Marinette and Oil States also move for summary judgment on the claims against them. There is no

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opposition to their motions.

After an independent review of the facts, the Court finds that there is no material issue of fact as to whether any alleged defect in the design or construction of either the *Mohawk* or the tow guide assembly caused Bruemmer's injuries. Given the extreme forces that were placed on it, even a flawlessly designed and installed assembly would have broken. Accordingly, the Motions for Summary Judgment of Oil States and Marinette will be granted.

VI. McAllister's Motion for Partial Summary Judgment

McAllister has also moved for partial summary judgment, asking the Court to hold, as a matter of law, that the actions of docking pilot Charles Chamberlain ("Chamberlain") cannot be imputed to it. McAllister has presented two arguments why it is not responsible for any errors Chamberlain may have committed: (1) the towing of the *Guadalcanal* was subject to a pilotage clause, under which it is not liable for the conduct of the docking pilot; (2) Chamberlain was an independent contractor, not its employee. [FN11]

> FN 11. Claimant Charles Chamberlain argues that the pilotage clause was not a part of the contract between Global and McAllister. However, the Court need not reach this issue because it finds that even if it were a part of their agreement, it would not apply to the facts

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at bar.

A. *The Pilotage Clause*

***11** McAllister argues that under the pilotage clause, Chamberlain would have been a *borrowed servant* of the United States, and that, as a consequence, McAllister cannot be held liable for his conduct. McAllister's pilotage clause applies to a towing operation where one of McAllister's pilots or captains is "engaged in the service of assisting a vessel making use of or having available her own propelling power." Exhibit E to McAllister's Motion for Partial Summary Judgment at 3 ("Pilotage Clause").

In *Tidewater Grain Co. v. S.S. Point Manatee*, the Court construed the "having available her own propelling power" clause to mean that the vessel's own power plant was available for use. *See* 614 FSupp. 29, 32 (D.C.Pa.1984). The court further noted that "[i]t is well established that a tug company employee piloting a dead ship (a ship having no propelling power of its own available) remains the employee of the tug company and does not become the borrowed servant of the owners of the dead ship." *Tidewater Grain Co.*, 6 14 F.Supp. at 32 (collecting cases).

There is no question that the *Guadalcanal's* power plant was not operational at the time of the tow. *See, e.g.*, Exhibits 1 and 2 to Charles Chamberlain's Memorandum in Opposition to McAllister's Motion for Partial Summary Judgment. It follows that the

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pilotage clause did not apply to the towing of the *Guadalcanal*, and, consequently, that the clause cannot insulate McAllister from liability for any negligence of Chamberlain. [FN12]

> FN12. McAllister argues in its Reply Brief that, in fact, the two McAllister tugs were assisting the *Mohawk* rather than the *Guadalcanal*. Since, McAllister argues, the Mohawk was operating under its own power, the pilotage clause does apply. *See* Response of McAllister Towing to Opposition of Bruemmer at 8. It is not clear, however, that the McAllister tugs were assisting the *Mohawk* rather than the *Guadalcanal*. A reasonable fact-finder might read the pilotage clause to apply only when the barge being towed (rather than the barge being assisted) is operating under its own power. Accordingly, there remains a genuine issue of material fact as to whether the pilotage clause applies, and summary judgment is inappropriate.

B. *Chamberlain's Employment Status with McAllister*

McAllister also argues that it is not liable for any negligence of Chamberlain, since Chamberlain was not McAllister's employee. However, a review of the pleadings shows that genuine issues of material fact remain as to Chamberlain's employment status with McAllister.

Chamberlain was paid approximately $17,000 per year to work exclusively for McAllister. Deposition of Frank J. Huesser, attached as Exhibit 5 to Chamberlain's Memorandum in Opposition to McAllister's Motion ("Huesser Deposition") at 33, 174, 258. McAllister also paid Chamberlain's social security taxes. Chamberlain received benefits through McAllister, including contributions to a 401(k) plan, major medical insurance, and life insurance. Huesser Deposition at 33, 133-34. Finally, McAllister has twice certified to the Coast Guard that Chamberlain is its employee. Huesser Deposition at 134-35. Thus, a trier of fact *could* conclude that Chamberlain was McAllister's employee. A finding of Summary Judgment in McAllister's favor would, therefore, be inappropriate.

VII. Conclusion

For the foregoing reasons, the Motion of the United States for Judgment on the Pleadings will be granted, the Motions for Summary Judgment of Marinette and Oil States will be granted, Global's Motion for Summary Judgment will be denied, and McAllister's Motion for Partial Summary Judgment will be denied.

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No. 81-1181

In the Supreme Court of the United States

OCTOBER TERM, 1981

LOCKHEED AIRCRAFT CORPORATION, *PETITIONER*

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 23, 1981

QUESTION PRESENTED

Where a federal worker is killed due to active negligence of the United States, is a party secondarily liable for his death precluded from recovering indemnity from the United States by the Federal Employees' Compensation Act, 5 U.S.C. § 8116(c)?*

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*The only parties to the proceeding in the Court of Appeals were Lockheed Aircraft Corporation and the United States. This action was brought in the United States District Court for the District of Columbia by Vincent C. Thomas, Jr. as administrator of the estate of Ann Nash Bottorff, individually and on the behalf of all others similarly situated, against Lockheed Aircraft Corporation. Lockheed impleaded the United States as a third-party defendant. After class action certification was denied by the District Court, Lockheed settled plaintiff's claim, so that plaintiff was no longer party to the action, although named in the captions of the decisions of the District Court and the Court of Appeals.

In 1977 the name of Lockheed Aircraft Corporation was changed to Lockheed Corporation. It has no parent company and no subsidiaries which are not wholly owned.

Lockheed's affiliates are: Arizona Fueling Facilities Corporation, Alaska State Fueling Facilities Corporation, CTL Corporation, Honolulu Fueling Facilities Corporation, Letlock Saudi Arabia Co. Ltd., Ocean Minerals, inc., Oklahoma Fueling Facilities Corporation, Panel Lock Homes (Phil.) Inc., Reno Fueling Facilities Corporation, San Francisco Fueling Facilities Corporation, Transnational Housing Company, and Utah Fueling Facilities Corporation.

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Federal Tort Claims Act, 28 U.S.C. § 1346(b) ... 2,5,7

LEGISLATIVE HISTORY:
S. Rep. No. 836, 81st Cong., 1st Sess (1949) .. 15,16
S. Rep. No. 1380, 89th Cong., 2d Sess. (1966) ... 12
H.R. Rep. No. 729, 81 st Cong., 1st Sess. (1949) .. 16
H.R. Rep. No. 901, 89th Cong., 1st Sess. (1965)... 12
95 Cong. Rec. S13606 (daily ed. Sept. 30, 1949) .. 16

OTHER AUTHORITIES:

Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195 (1975)..... 7

Note, 6 U. Toledo L. Rev. 273 (1974)..... 7,16

W. Prosser, Law of Torts (4th ed. 1971) 6,7

Fed. R. Civ. P. 14 9

IN THE

Supreme Court of the United States

October Term, 1981

LOCKHEED AIRCRAFT CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported, is unofficially reported at 16 Avi. Cases 17,849 (1981), and is set forth as Appendix A (1a) to this Petition. The opinion and order of the District Court from which appeal was taken are unreported and appear as Appendix B (9a). Two prior related decisions of the District Court, the first of which is reported at 476 F. Supp. 521, are set forth as Appendix C (11a). The judgment of the Court of Appeals sought to be reviewed appears as Appendix D (33a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case primarily involves the interpretation of a provision of the Federal Employees' Compensation Act, 5 U.S.C. § 8116(c). Lockheed's third-party complaint against the United States was brought in the District Court pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b). These statutory provisions are set forth in Appendix E (35a).

STATEMENT

On April 4, 1975, a C-5A military airlift aircraft took off from Saigon, Vietnam carrying Vietnamese orphans and numerous adults who were being evacuated in the final days of the Vietnam War (C.A.J.A. 199).[1] Shortly after takeoff the pilot was forced to make a crash landing and at least 144 of the approximately 320 persons on board were killed (C.A.J.A. 201). The plane was manufactured by petitioner Lockheed Aircraft Corporation and was owned, maintained and operated by respondent United States (C.A.J.A. 192-93, 195). Among the victims of the crash was Ann Nash Bottorff, a civilian employee of the United States (C.A.J.A. 204).

The Government paid death benefits to Ms. Bottorff's survivors, as provided by the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§

[1] The joint appendix in the Court of Appeals is referred to herein as "C.A.J.A."

8101 *et seq.* (C.A.J.A. 205). In addition, the administrator of her estate, Vincent C. Thomas, Jr., filed a diversity suit in District Court against Lockheed seeking damages for her wrongful death and for injuries she suffered prior to her death (C.A.J.A. 9).[2] On January 9, 1976, Lockheed impleaded the United States as a third-party defendant, seeking indemnity or contribution under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), and on other grounds (C.A.J.A. 32).[3]

During the next few years Lockheed settled most of the wrongful death claims filed against it on behalf of civilian government employees, including the claim on behalf of Ms. Bottorff's estate. In the third-party litigation between Lockheed and the United States, the Government advised the District Court on October 5, 1979, that based on "extensive depositions of government and Lockheed witnesses and review of many thousands of documents," it would not contest the sufficiency of the facts underpinning Lockheed's claim for indemnity but rather would only reserve

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[2] This case was consolidated with related cases brought against Lockheed by or for more than 200 decedents and survivors of the crash, including civilian employees of the United States, military employees, nongovernment volunteers, Vietnamese orphans and foreign nationals. By agreement of the parties, the ruling in this case will govern Lockheed's indemnity claims respecting civilian government employees.

[3] Thereafter, the Government and Lockheed entered into two agreements which were filed in the District Court under seal pursuant to a protective order. These agreements relate primarily to certain settlement matters as well as to the effect that the decision in this case is to have on related cases arising out of the Saigon crash.

certain legal defenses to Lockheed's claim (C.A.J.A. 136). In related litigation concerning the claims of orphans allegedly injured by the crash landing, the United States also agreed "not to contest its liability to Lockheed for indemnity or contribution for any such compensatory damages" paid to surviving infants.[4]

1. *Uncontested Facts Supporting Lockheed's Motion for Summary Judgment Against the United States.* On November 19, 1979, Lockheed moved for summary judgment on its indemnity claim on the ground that the uncontested facts demonstrate "the active and primary negligence of the United States" (C.A.J.A. 139, 161); the Government simultaneously moved to dismiss Lockheed's claim for tort indemnity on the ground that it is barred by the exclusive liability provision of FECA, 5 U.S.C. § 8116(c) (C.A.J.A. 206, 209); and on the same date these parties filed a joint statement of material facts not in dispute (C.A.J.A. 192).[5]

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[4] This stipulation of September 14, 1979, is filed in *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, Civ. No. 76-0544 (D.D.C.). The cases governed by this stipulation are being tried seriatim in the District Court on the issues of proximate cause and damages.

[5] There are uncontested facts in addition to those set forth in the joint statement of material facts not in dispute. After discovery had been completed in this case, the District Court ordered the parties to file pretrial briefs setting forth, *inter alia*, a detailed "statement of all facts proposed to be proven." Facts not denied by the responding party were to be deemed uncontroverted. (C.A.J.A. 62-65. 133.) On September 25, 1979, Lockheed filed its pretrial brief setting forth the facts it intended to prove at trial. (C.A.J.A. 84.) The Government responded on October 5, 1979, that it would not contest the facts presented by Lockheed to establish liability. (C.A.J.A. 136.)

Among the salient and uncontested material facts demonstrating the United States' active and primary negligence are the following:

(1) The C-5A aircraft was specially built for the Air Force, and the aft cargo door system and the hydraulic and flight control systems were built to the "design-to" specifications of the Air Force (C.A.J.A. 92, 146, 193-94). The Air Force participated in and supervised the testing of the C-5A (C.A.J.A. 89).

(2) Shortly before the accident the tie rods in the aft ramp locking system of the aircraft had been cannibalized by Air Force personnel for use on another C-5A and improperly replaced by other tie rods (C.A.J.A. 101-02, 198-99), in violation of Air Force regulations (C.A.J.A. 110). Had the regulations been complied with, the tie rods would not have been removed and replaced, misrigging would not have occurred, and the accident would not have happened (C.A.J.A. 110).

(3) During the last maintenance work performed on the aircraft, Air Force personnel failed to properly rig the aft ramp locking system (C.A.J.A. 104, 195), in violation of Air Force regulations concerning maintenance procedures (C.A.J.A. 199, 202). Had these regulations been followed, the aft ramp locking system would have been properly rigged, and the accident would have been avoided (C.A.J.A. 109).

(4) Prior to the accident Lockheed proposed that the Air Force implement a special training program on rigging to correct a high degree of misrigging and cannibalization in C-5A

maintenance. The Air Force rejected this proposal (C.A.J.A. 96-97, 196-97).

(5) The Air Force failed to advise Lockheed of previous failures of cargo doors due to misrigging of tie rods (C.A.J.A. 111-13, 203).

(6) Although palletized passenger seating for the lower cargo compartment of the C-5A was available, and could have been installed, it was not installed. As a consequence, the passengers in the lower cargo compartment were not restrained on seats by seatbelts but rather were seated on the floor of the cargo deck on blankets and pillows and strapped down with cargo straps (C.A.J.A. 200).

(7) Shortly after takeoff and before the accident on April 5, 1975, the aircraft's aft cargo door unlocked due to misrigging, causing the door and the aft ramp to separate from the aircraft. Hydraulic lines and control cables running to the tail were severed (C.A.J.A. 200). The pilot attempted to return to the Saigon airport but crash landed in a rice paddy several miles short of the Saigon airport runway (C.A.J.A. 154).

(8) Of approximately 151 passengers and crew members in the cargo compartment, only 8 survived (C.A.J.A. 201). In contrast, all but 3 of the approximately 159 passengers and crew in the troop compartment survived (C.A. J.A. 201).

(9) There is no competent evidence that the accident resulted from any structural problem or stress corrosion of any of the component parts of the aft ramp locking system (C.A.J.A. 108, 201).

2. *Decisions Below.* On the undisputed facts presented, the District Court, pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b), granted Lockheed's motion for summary judgment on its claim for indemnity against the United States (9a). The Court of Appeals reversed, holding that the exclusive liability provision of FECA, 5 U.S.C. § 8116(c), bars Lockheed's claim for indemnity. Relying on its earlier decision in *Murray v. United States*, 405 F.2d 1361, 1364 (D.C. Cir. 1968), the Court of Appeals held that FECA bars all claims for indemnity for damages paid to a federal employee, or his representative except possibly those resting on an "independent duty" running from the United States to the third-party plaintiff. The Court of Appeals also held that it need not be detained by consideration of this "exception" because the noncontractual duties allegedly owed Lockheed by the United States[6]— "the duty to use the aircraft in the manner contemplated by both Lockheed and the United States" and "the duty to provide adequate maintenance of the aircraft to prevent accidents of this type from occurring"—were only "derivative tort claims" (6a).[7]

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[6] Lockheed initially made a claim for contractual indemnity in the District Court but did not pursue that claim there because of the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491, which requires a claim in excess of $10,000, such as Lockheed's, to be pursued in the Court of Claims. Therefore, the only issue presented to the Court of Appeals and to this Court is whether Lockheed's claim for tort indemnity is barred by 5 U.S.C. § 8116(c).

[7] Lockheed had also claimed that the United States had breached its duty "to provide Lockheed with information about incidents involving the safety of the aircraft." One of the

(footnote continues)

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Sustains a Conflict in the Circuits on an Important Issue of Federal Law Requiring Uniform Treatment

The Court of Appeals' decision sustains a longstanding yet vibrant conflict in the circuits on whether the FECA, 5 U.S.C. § 8116(c), protects the Government against claims of indemnification by private parties when (a) the United States' active negligence is the primary cause of death or injury to a federal worker, but (b) the private party who is only secondarily liable has been required to answer for the wrongful death or injury.[8] This inter-circuit conflict was explicitly discussed by the Commission on Revision of the Federal Court Appellate System in

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(footnote continued)

incidents involved partial unlocking of an aft cargo door in flight and occurred approximately eight weeks before the accident. (C.A.J.A. 203). The Court of Appeals concluded that the duty to report sounded in contract rather than tort and thus was not properly before the Court (6-7a). See note 6, *supra*.

[8] Prosser states: "Indemnity is a shifting of responsibility from the shoulders of one person to another; and the duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other. This may be because of the relation of the parties to one another, and the consequent duty owed; or it may be because of a significant difference in the kind or quality of their conduct."

W. Prosser. Law of Torts, p. 313 (4th ed. 1971).

This Court's decision in *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951) established that the Federal Tort Claims Act, 28 U.S.C. § 1346(b), constitutes the Government's consent to be sued for contribution or indemnity.

support of its proposal for a National Court of Appeals. In the Commission's view the issue presented here warrants "a nationally binding decision":

> "The issue is whether the exclusive remedy provision of the Federal Employees' Compensation Act bars the claim of a third party under the Federal Tort Claims Act for indemnity or contribution against the Federal Government for damages paid to an injured government employee. Two 1963 decisions of the Supreme Court have given rise to what one court calls 'hopeless conflict' among the lower federal courts. At least four circuits have now held that recovery is precluded; a 1969 Fourth Circuit decision holds otherwise."

Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 227-28 (1975); see *id.* at 283-84.

The current breakdown is as follows: In addition to the District of Columbia Circuit, the Second, Third, Seventh and Ninth Circuits read FECA to bar tort indemnification from the United States for the injury or death of a federal worker.[9] *Galimi v. Jetco, Inc.*, 514 F.2d 949, 950-56 (2d Cir. 1975) (explicitly holding contribution barred and implicitly barring tort indemnification, but failing to distinguish contribution from tort indemnification); *Travelers Insurance Co. v. United States*, 493 F.2d 881, 884-87 (3d Cir. 1974)

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[9] In our view neither contribution nor indemnification is barred by 5 U.S.C. § 8116(c), but this case only involves the question of indemnification. See generally Note, 6 U. Toledo L. Rev. 273, 288-89 (1974). See also note 10, *infra*.

(affirming dismissal of a complaint seeking indemnity or contribution from the United States pursuant to the Federal Tort Claims Act); *Kudelka v. American Hoist & Derrick Co.*, 541 F.2d 651, 658-60 (7th Cir. 1976) (following the Second Circuit's decision in *Galimi*); *United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 402-04 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964) (holding that the exclusive remedy provision removes the underlying liability of the Government necessary for indemnity); *Adams v. General Dynamics Corp.*, 535 F.2d 489 (9th Cir. 1976). *cert. denied*, 432 U.S. 905 (1977) (adhering to *United Air Lines*). The First Circuit has held contribution barred by FECA, but has reserved decision on whether indemnification of a person only secondarily liable is precluded. *Newport Air Park, Inc. v. United States*, 419 F.2d 342, 343-47 (1st Cir. 1969). On the other hand, the Fourth Circuit in a well-reasoned opinion has squarely held that the exclusive remedy provision of FECA does not bar the claim of a third party (secondarily liable for injury to a federal employee) from seeking indemnity from the Federal Government for damages paid to the employee. *Wallenius Bremen, G.m.b.H. v. United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970).

The inter-circuit conflict is robust, as well as venerable. Five days after the decision below, the Fourth Circuit declined to reconsider its holding in *Bremen*. In *Glover v. Johns-Manville Corp.*, No. 80-1085 (4th Cir. Oct. 5, 1981), several manufacturers of asbestos sought indemnity for damages paid to a federal employee who, after recovering compensation under FECA, had sued the manufacturers in tort. The Fourth Circuit held that the manufacturers were actively negligent as a matter of law and hence under

established tort principles were not entitled to indemnification. In reaching the merits of the manufacturers' indemnity claim, that court refused to overrule *Bremen*:

> "The parties have expended a large portion of their arguments on appeal on the question of the propriety of the rule, set forth in *Bremen*, that third parties unrelated to an injured employee are beyond the scope of the FECA exclusivity clause. For the purpose of this opinion, we will assume without deciding that §8116(c) of the FECA is inapplicable to this action, and only comment that there is no merit to the United States' contention that *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597 (1963) upon which *Bremen* relied, was overruled by *United Stores v. Reliable Transfer Co.*, 42 1 US. 397 (1975)." Slip op. at 7.

A concurring judge objected to the majority's "implied application of the *Bremen* doctrine," stating that he was "troubled by the fact that this Circuit permits a tortfeasor to seek indemnity from the United States" despite FECA and that he would prefer to seek "*en banc* reconsideration of the *Bremen* analysis." Slip op. at 20 (Hall, J. concurring).

The issue presented is of widespread importance; it affects any person dealing with the United States or one of its employees. Whether the interpretation of FECA by the court below is correct or incorrect, the lack of a uniform national rule should not be countenanced by this Court. If, as the court below evidently thought, allowance of claims for indemnity against the United States by persons secondarily liable for a federal employee's death or injury would

undermine Congress' intent in enacting the exclusive liability provision of FECA, that policy should be enforced throughout the nation.[10] The present diversity of rulings fails to protect the Government's pocketbook, leads to grossly different treatment of persons secondarily liable for harm to a federal worker, and encourages forum shopping. [11]

On the other hand, if, as demonstrated below and as this Court recognized in *Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597, 601 (1963), Congress did not intend to disturb "the rights of unrelated third parties" when it enacted the exclusivity provision, the troublesome consequences of the misinterpretation adopted below are quite far-reaching and warrant correction by this Court. The interpretation adopted by the court below divorces 5 U.S.C. §8116(c) from its intended purpose—to eliminate the Government's tort liability to its employees and in exchange to afford them assured

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[10] In passing the exclusive liability pmvision of FECA, Congress did not intend to affect the rights of third parties entitled to indemnity, but only to limit the direct liability of the Government to its employees. See pp. 11-17, *infra*. Moreover, recovery of indemnity by Lockheed would not expose the Government to extravagant or unwarranted liability. In this case the United States' active and primary negligence has caused the death of its employee, while Lockheed was only secondarily liable. It is therefore both reasonable and just that the United States indemnify Lockheed. See note 8, *supra*.

[11] In assessing the likelihood of undesirable forum shopping occasioned by the conflict in the circuits, it should be kept in mind that the provisions of Fed.R.Civ.P.14 authorizing third-party claims are permissive, not mandatory. A party may refrain from impleading a third-party defendant in favor of asserting his claim for indemnity in a separate independent action. See

(footnote continues)

compensation benefits from the Government without proof of fault. Instead, it imposes an unfair burden on a stranger to the federal workmen's compensation scheme.[12] Moreover, contrary to "[t]he approach of the indemnity cases in this Court"—to place the risk of liability on the person "in the best position to avoid accidents," *Scindia Steam Navigation Co. v. De Los Santos*, 49 U.S.L.W. 4405, 4409 (US. April 21, 1981)[13]—the decision below prevents a party only secondarily responsible from shifting the risk of liability to the party whose active negligence was primarily responsible for the accident. Thus, the

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(footnote continued)

United States v. Yellow Cab Co., 340 US. 543 (1951). Accordingly, as matters stand in the circuits, a defendant secondarily liable for the injury or death of a federal employee is well-advised, if sued outside the Fourth Circuit, to institute a separate indemnity action in one of the district courts in the Fourth Circuit.

[12] Workmen's compensation statutes expressly precluding third-party claims for indemnity against an employer for injuries to an employee have been declared unconstitutional under the due process and qual protection clauses by two state Supreme Courts. *Carson v. Smogard*, 215 N.W.2d 615 (Minn. 1974); *Sunspan Eng'r & Constr. Co. v. Spring-Lock Scafolding Co.*, 310 So.2d 4 (Fla. 1975). Moreover, this Court's decisions upholding the constitutionality of state workmen's compensation statutes emphasized that it might well violate due process for a legislature to "set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute." *New York Central R.R. v. White*, 243 U.S. 188, 201 (1917); see *Mountain Timber Co. v. Washington*, 243 US. 219, 240-41 (1917). The exclusive liability provision of FECA should be construed to avoid this constitutional infirmity. See, *e.g.*, *NLRB v. Catholic Bishop of Chicago*, 440 US. 490, 500 (1979).

[13] See, *e.g.*, cases cited in note 16, *infra*.

decision below upsets sound principles of tort law designed to place liability on the person best able to take steps to avoid or minimize the risk of an accident. Furthermore, the decision below sanctions disparate treatment of similarly situated individuals: although other persons secondarily liable in tort may seek indemnity from the primary, active tortfeasor, those who are secondarily liable for injury of a federal worker must bear the entire burden of liability.[14] This disparity is exacerbated by the conflict in the circuits. Finally, the decision below imposes on persons dealing with the Federal Government the risk of extraordinary tort liability for the active, primary negligence of the Government, thereby increasing the cost of doing business with the Government and in turn the Government's own costs. This Court should grant the writ and definitively resolve whether Congress in enacting 5 U.S.C. §8116(c) intended to abrogate sound principles of tort indemnity and to impose such extraordinary risks on persons dealing with the Federal Government.

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[14] An irony of the decision below is that it discourages settlement of tort claims. In *Murray v. United States*, 405 F.2d 1361, 1365-66 (D.C. Cir. 1968), the court below held that a party responsible for injury to a federal employee cannot recover contribution from the United States as a joint tortfeasor, but that any judgment against the private tortfeasor should be "limited to one-half of the amount of damages sustained by plaintiff. . . ." In the present case, the court below noted the existence of the so-called *Murray* credit but declined to decide its continued validity (6a,n.4). Thus, had Lockheed tried plaintiffs suit it would, if *Murray* is still viable, have been entitled to limit its liability to one-half of plaintiffs damages; but since Lockheed settled that claim, with the concurrence of the Government, it must bear the entire burden.

II. The Court of Appeals' Decision is Contrary to Decisions of this Court and Inconsistent With the Language, History and Policy of the Federal Employees' Compensation Act

In 1949, Congress amended FECA to increase the benefits payable to federal workers and to provide, in new Section 7(b),[15] that the liability of the United States under the Act

> "with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States. . . to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States. . . on account of such injury or death, in any direct judicial proceedings . . ., whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute."[16] 63 Stat. 861-62 (1949).

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[15] The text of this provision was slightly recast in 1966 when Congress enacted Title 5 into positive law, 80 Stat. 542 (35a). In codifying Title 5, Congress expressly disclaimed any intent to change the substantive meaning of this provision. S. Rep. No. 1380, 89th Cong., 2d Sess. 18, 163 (1966); H.R. Rep. No. 901, 89th Cong., 1st Sess. 1, 143 (1965). The original statutory language set forth in the text referred to "any direct judicial proceeding" rather than "a direct judicial proceeding" (35a). The plain language of both versions clearly limits the subsection to "direct" judicial proceedings in contrast to indirect third-party actions such as the case at bar.

[16] This language was patterned after and is nearly identical to Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), which provided that

(footnote continues)

This Court explored the meaning of Section 7(b) in *Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597 (1963). The *Weyerhaeuser* case arose out of a collision between an Army dredge and a privately-owned vessel. A civilian federal employee aboard the dredge sustained personal injuries in the collison, collected compensation under FECA, and then sued the owner of the private vessel, Weyerhaeuser, for damages. Weyerhaeuser settled the employee's suit for

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(footnote continued)

"[t]he liability of an employer prescribed in section 4 [for compensation] shall be exclusive, and in place of of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . ." 44 Stat. 1426 (1927).

In *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 US. 124 (1956), this Court held that when a shipowner has paid damages to an injured longshoreman, Section 5 of the LHWCA does not preclude the shipowner from seeking contractual indemnity from the stevedoring contractor who employed the injured longshoreman. After quoting the statutory language set forth above, the Court stated:

> "The obvious purpose of this provision is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability *of such employer to its employee, or to anyone* claiming under or through such emp'oyee, *on account of his injury or death arising out of that employment*. In return, the employee, and those claiming under or through him, are given a substantial *quid pro quo* in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims. On the other hand, the Act

(footnote continues)

$16,000. *Id.* at 598. Meanwhile, Weyerhaeuser sued the United States for the damages it sustained in the collision, and the United States filed a cross-libel. The District Court found that the collision had occurred through the mutual fault of both vessels and, applying the admiralty rule of divided damages, held that each party was entitled to recover from the other one-half of its damages. Over the Government's objection that Section 7(b) of FECA barred the award, the District Court allowed Weyerhaeuser to recover one-half of the

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(footnote continued)

> prescribes *no quid pro quo* for a shipowner that is compelled to pay a judgment obtained against it for the full amount of a longshoreman's damages." 350 U.S. at 129 (emphasis in original).

Moreover, the Court found that the shipowner's claim for indemnity arose from the stevedore's obligation to load the cargo properly and accordingly was "not an action by or on behalf of an employee" and "not one to recover damages 'on account of' an employee's 'injury or death.' " *Id.* at 130.

In sum, a shipowner's claim to recover damages paid an injured longshoreman from the longshoreman's employer was consistent with both the purpose and language of the exclusive liability provision of the LHWCA. See also *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Reed v. The Yaka*, 373 U.S. 410 (1963); *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 US. 421 (1960); *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959).

In the 1972 amendments to the LHWCA, Congress abolished the longshoreman's right to recover damages from the vessel owner for unseaworthiness, preserved his right to recover for negligence on the part of the shipowner, and eliminated the stevedore's obligation to indemnify the shipowner if the latter is found liable to the longshoreman. 33 U.S.C. § 905(b). No similar amendment has been made to FECA.

$16,000 it had paid the injured federal employee. *Id.* at 598-99. The Ninth Circuit reversed. This Court granted certiorari and in a unanimous opinion held that Section 7(b) did not preclude Weyerhaeuser's claim to be reimbursed for one-half of the amount it had paid the injured federal worker.

This Court first examined the language of Section 7(b). In response to the Government's contention that the plain language of the statute barred the shipowner's claim—"anyone otherwise entitled to recover damages from the United States"—the Court noted:

> "But the general language upon which the Government relies follows explicit enumeration of specific categories: employees, their representatives, and their dependents. Under the traditional rule of statutory construction which counsels against giving to general words a meaning totally unrelated to the more specific terms of a statute, we think the meaning of the statutory language is far from 'plain'." *Id.* at 600-01.

Turning to the legislative history, the Court found that Section 7(b) was part of a *quid pro quo* between the Government and its employees and was not intended to affect the rights of unrelated third parties to seek reimbursement from the Government:

> "The legislative history of the Federal Employees' Compensation Act, originally passed in 1916, shows that the concern of Congress was to provide federal employees a swift, economical, and assured right of compensation for injuries arising out of the

employment relationship, regardless of the negligence of the employee or his fellow servants, or the lack of fault on the pan of the United States. *The purpose of § 7(b), added in 1949, was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. There is no evidence whatever that Congress was concerned with the rights of unrelated third parties*, much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collison cases." *Id.* at 601 (emphasis supplied).[17]

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[17] In a footnote to this passage. the Court quoted the Senate Report explaining the addition of Section 7(b):

> "Section 7 of the act would be amended by designating the present language as subsection '(a)' and by adding a new subsection '(b)'. The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.

(footnote continues)

Accordingly, the Court held that Section 7(b) did not preclude application of the admiralty rule of divided damages to permit Weyerhaeuser to receive reimbursement from the Government for damages paid to an injured federal employee.

The Court of Appeals did not purport to distinguish *Weyerhaeuser*. Decisions on which the court below relied, however, have suggested that *Weyerhaeuser* is "an anomaly, limiting its effect upon the exclusivity provision of FECA to the particular rule of admiralty ...." Note, 6 U. Toledo L. Rev. 273, 288 (1974). See, *e.g.*, *United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 402-03 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964). Such a

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(footnote continued)

> "Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute for the employee's (or dependent's) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act and the like, authorize in general terms the bringing of civil actions for damages against the United States. The inadequacy of the benefits under the Employees' Compensation Act has tended to cause *Federal employees* to seek relief under these general statutes. Similarly, corporate instrumentalities created by the Congress among their powers are authorized to sue and be sued, and this, in turn, has resulted in filing of suits *by employees* against such instrumentalities based upon accidents in employments.
>
> *(footnote continues)*

cramped reading of *Weyerhaeuser* is unwarranted. The Court's rationale is not so confined; it rests on (1) its reading of the general phrase "anyone otherwise entitled" in light of the prior enumeration of specific parties claiming through or on behalf of an injured or deceased federal worker,[18] and (2) its understanding that Congress did not intend Section 7(b) to affect the rights of unrelated third parties, but only to regulate the relationship between federal workers and their employer.

Furthermore, this Court has itself rejected such a narrow interpretation of *Weyerhaeuser*. While

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(footnote continued)

> "This situation has been of considerable concern to all Government agencies and especially to the corporate instrumentalities. Since the proposed remedy would afford *employees and their dependents* a planned and substantial protection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both *the beneficiaries involved* and the Government." S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949). *quoted in* 372 U.S. at 601-02 n.5 (emphasis supplied by the Court).

Section 7(b), as enacted, originated as a Senate substitute for a House-passed provision worded somewhat differently. 95 Cong. Rec. S13606 (daily ed., Sept. 30. 1949). The Senate Report is therefore more authoritative than the earlier House Report, although the latter does not appear to differ significantly in its explanation of the exclusive liability provision. H.R. Rep. No. 729, 81st Cong., 1st Sess. 14-15 (1949).

[18] Lockheed's claim for indemnity is outside the language of the exclusive liability provision of FECA for another reason as well. As originally enacted, that provision spoke of persons entitled to recover "damages" from the United States "on account of such

(footnote continues)

Weyerhaeuser was pending in this Court, certiorari was sought to review the decision of the Third Circuit that Section 7(b) precludes a party who has been held liable for negligence in causing injury to a federal employee from recovering contribution from the Government as a joint tortfeasor. *Drake v. Treadwell Construction Co.*, 299 F.2d 789 (3d Cir. 1962). In opposing certiorari, the United States argued that the grant of certiorari in *Weyerhaeuser* furnished no support for issuing the writ in *Treadwell*, a case not in admiralty, since *Weyerhaeuser* was concerned only with the admiralty rule of divided damages. Brief for the United States in Opposition at 6-9, *Treadwell Construction Co. v. United States*, 372 U.S. 772 (1963). Nevertheless, this Court granted certiorari, vacated the judgment of the Third Circuit, and remanded the case to the District Court for further consideration in

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(footnote continued)

injury or death." 63 Stat. 861-62. Since codification of Title 5, it speaks of persons entitled to recover "damages" from the United States "because of the injury or death.. . ." 5 U.S.C. §8116(c). Lockheed is entitled to reimbursement, not "damages" from the United States, and its claim is not "on account of" or "because of" the death of Ann Nash Bottorff, but because the United States' active negligence led to the imposition of secondary liability on Lockheed. See generally, *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E.2d 567 (1938); *Oaklawn Jockey Club, Inc. v. Pickens-Bond Constr. Co.*, 477 S.W.2d 477 (Ark. 1972); *Miller v. DeWitt*, 226 N.E.2d 630 (Ill. 1967). As stated in *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 152, 282 N.E.2d 288, 294 (1972), the employer's active negligence creates "a separable legal entity of rights" independent of the employee's cause of action.

light of *Weyerhaeuser*. *Treadwell Construction Co. v. United States*, 372 US. 772 (1963). On remand, the district court ordered contribution; the United States filed an appeal from that order but later moved for dismissal of the appeal on the recommendation of the Solicitor General. See *Hart v. Simons*, 223 F. Supp. 109, 111 n.1 (E.D. Pa. 1963).

In summary, the decision below is irreconcilable with this Court's decision in *Weyerhaeuser*. Ignoring the careful textual and legislative history analysis undertaken by this Court in *Weyerhaeuser*, the Court of Appeals interpreted the exclusive liability provision of FECA as precluding indemnification of, and hence placing extraordinary liability on, strangers to the compensation scheme established by that legislation. This Court should grant certiorari to prevent the undermining of Congressional policy, the erosion of the prior decisions of this Court, and the imposition of exceptional and unjustifiable liability on persons dealing with the Federal Government.

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the Court of Appeals.

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No. 81-1181

In the Supreme Court of the United States

OCTOBER TERM, 1981

LOCKHEED AIRCRAFT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a joint tortfeasor in the wrongful death of a federal employee is barred by the Federal Employees' Compensation Act from suing the United States for indemnity.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not yet reported. The order of the district court granting summary judgment (Pet. App. 9a-10a) is not reported. The district court's order incorporates by reference two earlier district court opinions (Pet. App. 11a-19a, 20a-32a). the second of which is reported at 476 F. Supp. 521.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1981. The petition for a writ of certiorari was filed on December 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Federal Employees' Compensation Act, 5 U.S.C. 8116(c), provides in pertinent part:

> (c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

STATEMENT

This case arose out of an accident involving a C-5A cargo plane that was manufactured by petitioner and was used by the United States in an emergency evacuation of approximately 300 people out of Saigon, Viet Nam, on April 4, 1975. The plane crashed, killing approximately 144 people. One of the passengers killed in the crash was Ann Nash Bottorff, a civilian employee of the Department of the Navy (Pet. App. 2a). Bottorffs' estate received death benefits from the United States under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* (Pet. 2). Additionally, on November 4, 1975, the administrator of Bottorff's estate filed suit against petitioner seeking

damages for her wrongful death and for injuries suffered prior to her death. On January 9, 1976, petitioner impleaded the United States as a third-party defendant, seeking indemnity or contribution on a variety of tort and contract theories. Counts I and II of petitioner's third-party complaint asserted a right to indemnity or contribution under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*; Counts III and IV sought relief under admiralty law; and Count V involved a claim for contractual indemnity. Petitioner subsequently abandoned its contractual indemnity claim (Pet. App. 2a-3a & n.2).

Petitioner settled with Bottorff's estate and then moved for summary judgment in the third-party action. The government filed a motion to dismiss on the ground that petitioner's action was barred by the FECA (Pet. App. 3a). In an order dated December 7, 1979, the district court granted petitioner's motion for summary judgment (*id.* at 9a). The district court held that petitioner was entitled to indemnity from the United States under the FTCA and that such a claim over was not barred by the FECA (*id.* at 10a).[1]

The government appealed, and the court of appeals reversed (Pet. App. 1a-8a). It found in 5 U.S.C. 8116(c) a clear intention to prohibit tort claims for contribution or indemnity that merely derived from duties owed by the government to its employees. Petitioner's claim for indemnity was based on an assertion that the government had failed to use and maintain the aircraft properly. Those obligations, the court held, did not run to petitioner; they were "clearly-

[1] The district court did not reach petitioner's maritime law claims.

derivative and based upon the duties owed by the Government to its employees and passengers" (Pet. App. 7a). With respect to petitioner's claim for contribution, the court also held that "no right of contribution exists 'unless there is a joint liability of both parties to the injured person' " (*id.* at 5a). The FECA, however, had displaced the government's tort liability for injuries to its own employees.[2] The court of appeals remanded the case to the district court for a determination of jurisdiction over petitioner's maritime law claims, and a decision about the effect of the FECA on such claims (*id.* at 8a n.5).

ARGUMENT

1. The court of appeals correctly interpreted the ECA to preclude petitioner's claim for indemnity against the government. 5 U.S.C. 8116(c) states that the duty of the United States to pay compensation regardless of fault under the FECA is "exclusive and instead of all other liability of the United States" to "any other person * * * entitled to recover damages from the United States * * * because of the injury or death" of its employee. The court of appeals was obviously correct in concluding that the government owed no independent obligation to petitioner, which was really relying on duties owed by the government to its employees. That being so, petitioner is claiming a right to indemnity "because of" the employee's death, and its claim is barred by the FECA's unqualified limitation of liability.

Petitioner does not now dispute that its third-party

[2] At this stage petitioner does not contest the disposition of its claim for contribution (Pet. 7 n.9).

claim against the government derives from the employee's. Rather, it argues that the phrase "any other person" refers only to people like dependents and beneficiaries, not to unrelated third parties. It also asserts that reading the FECA to bar an indemnity claim by a passive wrongdoer is unfair, because it exposes petitioner to a judgment for the entire amount of the plaintiff's damages (Pet. 11).

In analogous contexts this Court has rejected both of these claims. For example, the Veterans' Benefits Act, 38 U.S.C. 301 *et seq.*, establishes a statutory no-fault compensation scheme for injured servicemen, as the FECA does for government employees. Unlike the FECA, the Veterans' Benefits Act does not explicitly provide that it is the exclusive remedy against the government for servicemen's injuries. Notwithstanding that fact, this Court held in *Stencel Aero Engineering Corp. v. United States*, 431 US. 666 (1977), that an indemnity claim against the United States under the FTCA was barred where the Veterans' Benefits Act prevented the injured serviceman himself from suing under the FTCA. The Court explained:

> A compensation scheme such as the Veterans' Benefits Act serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but it also clothes the Government in the "protective mantle of the Act's limitation-of-liability provisions." * * * "To permit [an indemnity claim] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result."

431 U.S. at 673 (citations omitted). The Court explicitly rejected the argument that "petitioner [a manufacturer of military aircraft parts] as a third-party claimant should not be barred from indemnity for damages which it may be required to pay to the serviceman, and as to which it has no alternative federal remedy." *Id.* at 672.

The history of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) provides another parallel. Section 5 of the LHWCA, 33 U.S.C. 905, provides, in language virtually identical to that used by the FECA, that the statutory compensation scheme is the exclusive remedy against the employer for an employee's injury or death.[3]

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[3]Section 5 states:

The liability of an employer prescribed in section 904 of this title [for compensation] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *.

In *Ryan Co. v. Pan-Atlantic Corp.*, 350 U.S. 124 (1956), relied upon by petitioner (Pet. 12-13 n.16), this Court held that Section 5 did not free a stevedore-employer from a contractual obligation that it had undertaken to indemnify the shipowner. But this Court continually emphasized that "[s]uch a liability springs from an independent contractual right. * * * The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. * * * Consequently, the considerations which led to the decision in *Halcyon Lines* * * * are not applicable." *Id.* at 130-133.

The purpose of the 1972 amendment to the LHWCA, 33 U.S.C. 905(b), was to nullify this contractual duty to indemnify, and to overrule *Ryan*. *Cooper Stevedoring Co. v. Kopke, Inc.*, 417 U.S. 106, 113 n.6 (1974).

This Court has made clear that under those circumstances, a third party who was a joint tortfeasor with the employer had no right of contribution from the employer. *Atlantic Coast Line R. R. v. Erie Lackawanna R. R.*, 406 U. S. 340 (1972); *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282 (1952). Cf. *Cooper Stevedoring Co. v. Kopke, Inc.*, 417 U.S. 106 (1974). As the Court said in *Cooper* (*id.* at 115): "[E]ven if [the employer] were negligent, its injured employee was entitled to claim compensation from it under the Harbor Workers' Act, and [the employer] was accordingly entitled to the protective mantle of the Act's limitation-of-liability provisions" when sued for contribution.[4]

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[4] Petitioner relies in part on *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597 (1963), which held that a shipowner was entitled to indemnity against the government in connection with a maritime collision, notwithstanding the FECA's limitation of liability. But the reason for that conclusion was that the Public Vessels Act had made applicable to the government the "historic admiralty rule of divided damages in mutual fault collisions." *Id.* at 600. And that rule had previously been held to prevail over statutory provisions limiting liability. *Id.* at 603-604. As a result, the lower courts have, quite correctly, interpreted *Weyerhaeuser* to apply only to maritime collision cases. See, *e.g.*, *Galimi v. Jerco, Inc.*, 514 F. 2d 949, 954-955 (2d Cir. 1975); *Sheridan v. Di Giorgio*, 372 F. Supp. 1373 (E.D. N.Y.), aff'd without opinion, 505 F. 2d 727 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975); *Empire Seafoods, Inc. v. Anderson*, 398 F. 2d 204, 213 and n.12 (5th Cir.), cert. denied, 393 US. 983 (1968); *United Air Lines, Inc. v. Wiener*, 335 F. 2d 379, 402-404 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964). But see *Wallenius Bremen G.m.h.H. v. United States*, 409 F. 2d 994 (4th Cir. 1969), cert. denied, 398 U.S. 958 (1970).

The Fourth Circuit has recently held that the *Stencel Aero* rule against indemnity claims in Veterans' Benefits Act cases does

(footnote continues)

2. Contrary to petitioner's suggestion (Pet. 6-9), there is no "vibrant" conflict among the circuits regarding the FECA's effect on tort indemnity claims. With the exception of a 1969 Fourth Circuit decision, every circuit to address the question has held that the FECA bars third-party claims against the United States that are not based on some independent contractual duty.[5] Even the Fourth Circuit's maverick position in *Wallenius Breman G.m.b.H. v. United States*, 409 F. 2d 994 (1969), cert. denied, 398 U.S. 958 (1970), has shown signs of erosion. For example, in a concurring opinion in a recent Fourth Circuit decision, Judge Hall suggested that the *Bremen* rule should be reconsidered en banc, commenting:

(footnote continued)

not apply to maritime collisions. *Ionian Glow Marine, Inc. v. United States*, No. 81-1466 (Jan. 26, 1982). Even if correct, the decision has little bearing on this case, since the justification for departing from *Stencel* was *Weyerhaeuser's* unique divided damages rule, whose application, as noted above, is restricted to maritime collisions.

[5] See *e.g.*, *Kudelka v. American Hoist and Derrick Co.*, 541 F. 2d 651 (7th Cir. 1976) (involving a claim for tort indemnity); *Galimi v. Jetco. Inc.*, 514 F. 2d 949 (2d Cir. 1975) (involving a claim for contribution); *Travelers Insurance Company v. United States*, 493 F. 2d 881 (3d Cir. 1974) (involving a claim for indemnity or contribution); *Newport Air Park. Inc. v. United States*, 419 F. 2d 342 (1st Cir. 1969) (involving a claim for contribution); *Wien Alaska Airlines, Inc., v. United States*, 375 F. 2d 736 (9th Cir.), cert. denied, 389 U.S. 940 (1967) (involving a tort indemnity claim), which followed *United Air Lines, Inc. v. Wiener*, 335 F. 2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964) (involving a tort indemnity claim); *Sheridan v. DiGiorgio*, 372 F. Supp. 1373 (E. D. N.Y.), aff'd without opinion, 505 F. 2d 727 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975). Contra, *Wallenius Bremen G.m.b.h. H. v. United States*, *supra*.

(footnote continues)

> [T]hat decision [*Bremen*] is binding precedent for the Circuit. Nevertheless, *Bremen* is wrong because it misinterpreted the authorities upon which it relied, and because it failed to recognize the importance of exclusivity provisions to workmen's compensation programs. *Bremen's* faulty analysis has been criticized and rejected by the other circuits [footnote omitted], leaving our court with the dubious distinction, of being the sole adherent to the *Bremen* rule.

Glover v. Johns-Manville Corp., 662 F. 2d 225, 233 (4th Cir. 1981). Hence, there is reason to believe that, in an appropriate case, the Fourth Circuit would be prepared to reconsider *Bremen* in light of *Stencel Aero* and the subsequent decisions in several other courts of appeals. Until the Fourth Circuit indicates that it still adheres to its solitary view, there is no need for this Court to intervene.[6]

(footnote continued)

In 1974 Congress amended the FECA in numerous respects, including modifications to Section 8116. Pub. I., No. 93-416, 88 Stat, 1143. It can be presumed that Congress was by then aware of the courts' virtually uniform interpretation of Section 8116(c) to bar tort indemnity claims. Yet there is no suggestion in the legislative history of these amendments that the court have departed from Congress' original intent. See also Pub. L. No. 90-83, 81 Stat. 195 (1967 amendments to FECA).

[6] Contrary to petitioner's contention (Pet. 8), the Fourth Circuit did not "refuse to overrule *Bremen*" in *Glover*. In fact, *Glover* held that the manufacturer, charged only with active conduct, was not entitled to noncontractual indemnity against the United States. *Glover v. Johns-Manville Corp.*, *supra*, 662 F. 2d at 229. In the course of its opinion the court simply "assume[d] without deciding that §8116(c) of the FECA is inapplicable to this action * * *." *Id.* at 228.

CONCLUSION

The petition for a writ of certiorari should be denied.

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